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UNITED STATES DEPARTMENT OF AGRICULTURE
Agricultural Marketing Administration
Washington, D.C.

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SUMMARIES OF DECISIONS BY THE SECRETARY OF AGRICULTURE
of complaints filed under
THE PERISHABLE AGRICULTURAL COMMODITIES ACT

No. 8

- NOT TO BE PUBLISHED -

June 1, 1942

I N D E X

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PACA SUMMARIES OF DECISIONS NOT TO BE PUBLISHED

S-925, January 16, 1935, Docket 1115: (Hearing)

SOUTH CAROLINA PRODUCE ASS'N., MEGGETT, S. C. v.
A. E. FREEMAN, INC., PHILADELPHIA, PA.

Violation charged: Rejection without reasonable cause.

Principal points involved: Delay in getting possession of cars account "advise" billing; not sufficient grounds for rejection; memorandum of sale signed by broker sufficient to satisfy Statute of Frauds.

Order: Reparation awarded complainant in the sum of \$585.51, with interest, and facts ordered published.

Appeal: Filed February 1, 1935; appeal dismissed November 28, 1939.

Outline of Facts

Complainant sold respondent two cars of Charleston Wakefield cabbage in 1-1/2 bushel hampers at \$1.25 per hamper f.o.b. Meggett, S. C., plus \$18 per car top icing, or a total of \$1143.50, the sale being negotiated by the Atlantic Commission Co., Philadelphia, as agent for both parties. The cars were billed to the South Carolina Produce Ass'n. advise A. E. Freeman, Philadelphia, Pa. and on arrival were rejected. They were resold for \$554.24 leaving a balance of \$589.26. From this there was to be deducted a credit for empty hampers in the sum of \$3.75, making the loss \$585.51.

Respondent admitted receipt of the memorandum of sale but stated that it notified the broker that these cars were wanted for Monday's market; that they did arrive sometime Sunday night and were available for Monday's market, but that neither the broker nor the railroad company had any authority to deliver the cars to respondent; that respondent's instructions were to the effect that the cars must be released to it so that they would be available for Monday's market and that since this part of the agreement was not carried out respondent did not feel obligated to accept the cars. Respondent set up as a further defense:

(1) A denial that it at any time negotiated with the complainant, and a demand for proof that complainant is a cooperative association vested with right and power to bring the action. It was held that respondent admitted ordering the cabbage through the broker; that the broker was the

agent of the respondent; and that the signing of the memorandum of sale by the broker bound both parties. It was further held that documentary proof had been supplied of the incorporation of the complainant under the laws of South Carolina.

(2) A denial that there was any agreement in writing between the parties since all respondent's negotiations were oral and with the Atlantic Commission Co. The point was covered by ruling on 1.

(3) A claim that it was the essence of the agreement that the cars should be "addressed" to the respondent who should have appeared as the direct consignee. Held that respondent's effort to inject this specification was made the day after the contract was entered into and could not be considered part of the agreement except by mutual consent. The statement on the memorandum of sale that the cars were sold to respondent and were to be shipped to the P.R.R. Produce Terminal did not preclude complainant's protecting itself by the "advise" form of billing. The stipulation as to open billing was not a part of the agreement.

(4) A denial that the Atlantic Commission Co. was respondent's broker. This has been answered above.

(5) That respondent was unable to get immediate possession of the cars because of the form of billing. The form of billing was a common one and there being no specific stipulation as to the manner of billing this allegation was held without merit.

(6) A claim that respondent received no notice to the effect that the cars were being sold. Held not worthy of serious consideration because respondent admitted rejection and the shipper was justified in taking immediate steps to handle the situation, this not relieving the respondent of any liability incurred by rejection.

(7) A denial that complainant had suffered any loss and a demand for proof. Held that proof as to loss in the amount thereof was sufficient.

(8) A denial that at any time prior to arrival of cars respondent had received any broker's confirmation. Held that since the broker was the agent of the respondent and signed the memorandum of sale the time of its receipt by respondent was immaterial.

(9) A claim that under the laws of Pennsylvania the oral agreement between respondent and broker, involving amount in excess of \$500, was unenforceable unless reduced to writing and executed by a proper party. Held to be without merit since the Statute of Frauds merely requires that the memorandum of sale be signed by the party or his agent, and in this case it was signed by the agent.

(10) That the broker guaranteed that the cars would arrive in time for the early market on Monday, May 1. Held that the cars did arrive in time but were not available to respondent until later because of the manner of billing, which question has been discussed above.

Rulings included in Decision

1. It is not necessary that the two parties negotiate directly with each other. Negotiations may be carried on through an agent and even though these negotiations are oral the issuance of a memorandum by the agent as broker for both parties is sufficient.

2. The fact that a memorandum of sale shows a car-load as sold to a certain party with instructions as to the terminal to which it is to be shipped does not preclude the shipper's protecting itself by using the "advise" form of billing.

3. When a receiver has rejected the car and notified the broker to that effect the shipper is justified in reselling the car without specific notice to the receiver of that action.

4. When a broker signs a memorandum of sale as agent for the respondent the time of receipt of the memorandum by the respondent is immaterial.

5. The Statute of Frauds was satisfied by a memorandum of sale signed by the party or his agent.

Appeal

Appeal was filed in Federal District Court by respondent February 1, 1935, but was dismissed November 28, 1939, under rule of court for lack of prosecution.

S-1779, December 18, 1937, Docket 2053: (Hearing)

THE GOLDBERGER CO., NEW YORK, N. Y. v. BALDWIN-DOHERTY CO., HOULTON, MAINE.

Violation charged: Failure to ship 7 carloads of potatoes in accordance with contract.

Principal points involved: Sworn testimony of complainant's two witnesses as to the oral contract outweighed the denial thereof in respondent's answer; laws of State of performance governs contract; measure of damages explained; lack of proof of loss results in only nominal award.

Order: Complainant awarded \$1.

Outline of Facts

On March 29, 1935, complainant wired respondent an offer of 65¢ per cwt. for 8 carloads of U. S. No. 1 Maine Green Mountain potatoes, delivered at New York, N. Y. Complainant contended that following delivery of this telegram respondent called complainant on the phone and the sale of 8 carloads was arranged at 67¢ per cwt. delivered New York, one car to be shipped on April 1 and one carload each day thereafter. Respondent did ship one carload and it was received, accepted and paid for by complainant. Complainant asked for damages because of respondent's failure to ship the other seven cars.

Respondent denied that it agreed to sell 8 carloads at 67¢ per cwt. and said that the one car that was shipped was not intended as part performance under the claimed 8 carload purchase, but was shipped to complainant "in conformity with an arrangement between respondent and complainant whereby respondent was accustomed to shipping individual cars to complainant, who might either accept or refuse them."

Rulings included in Decision

1. Certain wires and letters exchanged between the parties closely following the telephone conversation on March 29 were considered somewhat material in determining whether the telephone conversation amounted to a contract. It was clearly evident that complainant expected delivery of 8 cars. On the other hand it was evident from respondent's letter of April 4 that respondent did not understand it had been agreed to ship 8 cars. Complainant's version of the conversation was corroborated by an employee of complainant who

testified he listened in and heard the telephone conversation. It appeared from the testimony of a representative of the railroad that respondent attempted to divert the car from complainant to another consignee. This may have been done to escape the effect of a partial delivery under the claimed sale, or for some other purpose. The physical facts were not convincing one way or the other, but the sworn testimony of the two witnesses above mentioned was not denied except in respondent's answer. It was therefore believed that the preponderance of the evidence established an oral contract of a purchase and sale and that respondent made partial delivery under the oral contract.

2. On the question of damages, the applicable section of the Uniform Sales Act provides that, where the property in the goods has not passed to buyer and seller wrongfully fails or refuses to deliver the goods, the buyer may maintain an action against the seller for damages for non-delivery. The measure of damages is the loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract. But where there is an available market for the goods in question the measure of damages, in the absence of special circumstances showing proximate damages of a greater amount, is the difference between the contract price and the market, or current, price of the goods at the time or times when they ought to have been delivered. This was a delivered sale transaction. Respondent's breach of contract consisted in its failure to deliver 7 carloads in New York City. The oral agreement, should, therefore, be considered as a State of New York contract. The courts have held that for a failure to deliver goods resulting in a breach of contract it becomes the duty of the injured party to reduce the damages by going into the open market and purchasing therein. Complainant testified he could have repurchased in carloads on the New York City market, but, on account of the advance in price, did not do so. His testimony as to the market price of the potatoes at New York City related to jobbing quantities. There was no evidence as to the number of bushels that should have been delivered in each car, unless it was assumed that the parties had in mind the same quantity as was contained in the car shipped. There was no evidence that complainant had made a resale of the potatoes or as to what it could have received if resale had been made, except certain jobbing sales. The absence of evidence concerning such details rendered it impossible to fix complainant's damages in any definite amount and complainant was therefore awarded \$1.

S-1895, May 31, 1938, Docket 2487: (S. P.)

CRADDOCK PRODUCE CO., NEWBURN, TENN. v. FISHER BROTHERS
CO., CLEVELAND, OHIO.

Violation charged: Unjustified rejection
of car of cabbage.

Principal points involved: Rules applying
to use of **standard** memorandum of sale
are not applicable to a letter from
broker to buyer purporting to amend
the contract; buyer failed to prove
the seller agreed to amendment of
original contract; (however, see below
re-rulings of court contrary to above.)

Order: Complainant awarded \$191.15 plus
interest.

Appeal: Secretary's order reversed by
Federal District Court December 28, 1939.

Outline of Facts

On June 3, 1936, through a broker, complainant sold to respondent one carload of 353 Los Angeles lettuce crates of cabbage, U. S. No. 1, green, mostly medium, at \$2.90 per crate f.o.b. shipping point. The car was shipped from Tennessee to respondent at Cleveland, Ohio, where it was refused by respondent. Resale was made for the net sum of \$872.55 and complainant asked for an award of the balance due, \$191.15

Respondent contended that it advised the broker the cabbage was to be Copenhagen round variety and that the broker issued an amendment to the contract of sale specifying that the car should contain that variety; that inspection at Cleveland indicated the car contained pointed and domestic round type; and that rejection was made within 24 hours after receipt of notice of arrival. Complainant denied that the contract was ever amended to include Copenhagen round variety as one of the specifications.

Rulings included in Decision

1. The original memorandum of sale issued by the broker provided for one car of Los Angeles crates, U.S. No. 1, green, mostly medium cabbage, \$2.90 f.o.b. The broker issued a supplemental memorandum to the respondent in which it advised that its shipper stated that Tennessee cabbage is Copenhagen round variety. Having once entered into a contract, it is necessary that all parties agree specifically to the amendment of this contract in any of its terms. Respondent admitted in its answer that it purchased "one carload

of 353 Los Angeles lettuce crates of cabbage, U. S. No. 1 at \$2.90 per crate f.o.b. shipping point." Thus, respondent admitted that the original contract called for the terms set forth in the complaint. The supplemental memorandum issued by the broker attempting to change the terms to include Copenhagen round variety must be shown to have been by agreement of all parties. It was not issued on a standard memorandum of sale, but was simply a letter. Therefore, the rules and regulations applying to the use of standard memorandum of sale would not apply to the purported amendment. It was the duty of respondent to show by a preponderance of the evidence that the complainant agreed to this amendment. It failed to do so and it was therefore held that the contract did not call for Copenhagen round variety.

2. The record showed that respondent was notified of the arrival of the car at 4:30 a.m. on June 5; that respondent notified the broker of its rejection of the shipment around 10:30 a.m. on June 6, and that Federal inspection of the car at destination was requested by the respondent at 10:50 a.m. on June 6. It was therefore clear that respondent did not reject the shipment within twenty-four hours after notice of arrival. The unjustified rejection resulted in a loss to complainant in the sum of \$191.15, for which amount, plus interest, complainant was awarded damages.

Appeal

Respondent, in June 1938, filed an appeal to the Federal District Court. On December 28, 1939, the Court sustained the appeal and reversed the Secretary's order, the Court holding that upon receipt of a copy of the broker's memorandum of sale the buyer promptly objected to the specification therein describing the cabbage, from which point the responsibility of fulfilling the corrected specifications was upon the broker as representative of the seller; that the buyer had the right to rely on the broker's letter of June 3; that the contract of sale was not amended but was corrected; and that the buyer contracted for "Copenhagen Round Variety Cabbage," which was not delivered.

S-2087, November 3, 1938, Docket 2998: (Hearing)

LOUIE COHEN CO., CHICAGO, ILL. v. W. E. ROCHE FRUIT CO., INC., YAKIMA, WASH.

Violation charged: Failure to deliver a carload of apples in accordance with contract specifications.

Principal points involved: Informal complaint is sufficient if filed within 9 months; in f.o.b. sale certificate of Federal inspection within 8 days after sale deserves more consideration than one 17 days before shipment; in f.o.b. sale misrepresentation by seller as to time of Federal inspection on which sale was based made buyer liable for actual value rather than contract price.

Order: Complainant awarded \$498.82 plus interest.

Appeal: Filed November 19, 1938; finding for respondent, and appeal dismissed March 19, 1941.

Outline of Facts

On May 14, 1937, complainants, through a broker, purchased from respondent a carload of Washington Extra Fancy Winesap apples at \$1.70 per box f.o.b. The broker's wire to respondent on May 13 stated that the apples were sold "basis complete wired Federal inspection and the broker's standard memorandum of sale made out the next day provided for acceptance subject to Federal inspection showing "75% to full Red mostly 90 to 100% good Red mostly ripe many firm ripe 1% decay", which had been reported by respondent May 13 without advising that the inspection reported by it and relied upon by the broker for this statement in the memorandum of sale, was made on April 27, or 17 days before the memorandum of sale was issued and shipment made by respondent. Shipment was made from the State of Washington to complainants at Chicago, Ill., where the apples were accepted by complainants, who apparently were satisfied with those in the doorway, and a draft which was drawn by respondent for \$1285.20, the contract purchase price, was honored by complainants. On going farther back in the car a considerable amount of damage was discovered and on May 22 Federal inspection was obtained on 650 boxes which showed: "Stock mostly firm ripe, a few firm, a few ripe. Decay occurs in most boxes, in some none, varying by lot marks from less than 1% in some lots to 25% in others, average approximately 11%. Decay is Blue Mold Rot,

in all stages, practically all occurring at stem end." Respondent offered an allowance of 20¢ per box, or \$151.20, but it was refused by complainants, who asked for \$621.82 to cover the loss sustained.

Respondent denied that the apples failed to meet contract requirements and contended that this proceeding was not brought within the time provided in the act.

Rulings included in Decision

1. Complainants submitted informal complaint under date of October 8, 1937, which was filled in the Bureau of Agricultural Economics on October 11. The complaint therefore was filed within the time allowed under the act, since regulation 5 provides for the filing of informal complaints by telegram or letter setting forth the essential details of the transaction or dispute involved. The practice is to allow the filing of such an informal complaint within the nine months' period allowed under the act as the time within which a complaint must be made, and to permit the filing of a more detailed formal complaint in the nature of an amendment at a later date and, if necessary, after the period of nine months allowed by the act has elapsed.

2. Complainants furnished adequate proof that the apples could not have been up to contract requirements at the time of shipment. The certificate of Federal inspection made at Chicago on May 22 showed that 25% of the apples in some lots were damaged by stem end rot. This inspection, which was made within eight days of the date of sale, certainly deserved more consideration than the certificate submitted by respondent, which was made 17 days before shipment. Under these circumstances respondent's objection to complainants' testimony concerning the condition and value of the apples at destination was overruled.

3. In the case of an f.o.b. sale subject to wired Government inspection the purchaser is liable under ordinary conditions for the contract purchase price of the produce, regardless of the condition at destination. However, respondent led complainants to believe that the Federal inspection reported by it was made at or about the time of negotiating the sale when, as a matter of fact, the inspection had been made approximately 17 days before the report was made to the broker and relied upon by him and the complainants. Such a report could not be held to bind complainants under the general rule requiring that they accept the apples without recourse, but placed them in the position of necessarily accepting the apples at their actual value if it could be shown. Having accepted goods which failed to meet the specifications in such a contract as here involved, complainants' damages were measured

by the difference between the agreed value of apples which would meet contract requirements and the market value of the apples actually delivered. Complainants so stated their damages and submitted documents from their records showing in detail the various sums received for each of the lots of apples under consideration which were sold by them. These records showed that the apples were sold by complainants for a net of \$1,229.97, which, when subtracted from the f.o.b. cost, freight, and other charges totaling \$1,851.79, left a difference of \$621.82. This amount included a 10% handling charge estimated at \$123 which it was believed should not be allowed under the conditions as they existed in this case. Complainants were therefore awarded \$498.82 plus interest.

Appeal

Appeal to Federal District Court filed by respondent November 19, 1938; trial by jury, with finding for respondent, and appeal dismissed March 19, 1941.

S-2141, January 25, 1939, Docket 2956: (Hearing)

WESTERN FRUIT GROWERS, INC., LOS ANGELES, CALIF. v.
J. A. BESTEMAN CO., GRAND RAPIDS, MICH.

Violation charged: Unjustified rejection of a carload of peaches.

Principal points involved: In f.o.b. sale seller not liable for bruised condition of peaches found almost entirely in top layer of the load which inspection certificate showed had shifted about 12 inches from one bunkerwall in transit.

Order: Complainant awarded \$349.15, plus interest.

Appeal: Decision reversed by Federal District Court May 25, 1939, on appeal.

Outline of Facts

On or about July 26, 1937, through a broker, complainant sold to respondent a carload of 396 bushels of U. S. No. 1 Elberta peaches $2\frac{1}{4}$ inch minimum, mostly $2\frac{1}{2}$ inches and larger, at \$2 per bushel, or \$792 for the carload f.o.b. Nashville, Ark. Shipment was made on or about July 23, and immediately following the sale to respondent it was diverted in transit to Grand Rapids, Mich., where it was tendered to and rejected by respondent, who contended that the peaches failed to meet contract requirements because of having been badly bruised in packing. Complainant thereafter diverted the car to Detroit, Mich., and realized the net sum of \$145.35 from resale, or \$646.65 less

than the original contract price, for which amount an award was asked. Complainant stated that later net proceeds of \$297.50 were received in satisfaction of a claim filed against the carrier, thereby reducing the claim to \$349.15.

Certificate of Federal inspection at shipping point showed the peaches graded U. S. No. 1, $2\frac{1}{4}$ inch minimum, and that the load was in good order. Certificate covering inspection made by the Railroad Perishable Inspection Agency within 3 or 4 hours after arrival at Grand Rapids showed shifting of the lading with "From 4 to 12 inches lengthwise movement in bottom to top layer 'A' to 'B' ends at 'A' end bunker" and stated: "Fruit firm and green in color with practically all fruit stems attached, 41% Firm Ripe, 21% Full Ripe and 16% overripe and soft - Decay ranges from sound to 4% averaging less than 1% Brown Rot practically all in early stages. Abnormal bruising practically all of which is confined to ripe and overripe fruit and regularly interspersed through tubs ranges from 13% to 32% averaging 22% soft, sunken discolored bruises $1\frac{1}{2}$ to 1 and $1\frac{1}{2}$ inches, nearly all $\frac{3}{4}$ to 1 inch in diameter. This bruising is irrespective of bruising found in disarranged or squeezed tubs which will be determined at time of unloading if unloaded at this market." This inspection certificate failed to show the extent to which each layer of baskets was examined and did not state whether some of the layers contained more bruised and damaged peaches than others. Federal inspection made at Grand Rapids, Michigan, on July 31, showed that the top layer of the load, where the damaged condition was generally found, was "shifted about twelve inches from one bunker-wall." This certificate also stated that the peaches in the top layer were generally firm, a few ripe and contained an abnormal amount of bruising scattered throughout the baskets; that the peaches in the middle and bottom layers were generally firm and showed "practically no abnormal bruising."

Ruling included in Decision

Respondent's rejection of the shipment was without reasonable cause. Certificate of Federal inspection disclosed that the peaches met contract requirements at the time and place of shipment. Since the abnormal bruised condition was found almost entirely in the top layer which had been shifted "about twelve inches from one bunkerwall", it was believed to have occurred in transit and resulted from abnormal transportation conditions. Since the damage resulted from abnormal transportation conditions not caused by the seller, the risk was one assumed by the buyer, and the question of "suitable shipping condition" under the circumstances may not properly receive consideration. Complainant was therefore awarded \$349.15, plus interest.

Appeal

Appeal was filed by respondent to the Federal District Court which, on May 25, 1939, reversed the Secretary's decision and held that the peaches failed to meet contract requirements at the date and place of shipment since, according to the Government inspector, whose views are entitled to controlling weight, the excessive bruises were "packing" bruises and not "transportation" bruises.

S-2176-B, May 22, 1940, Docket 3162: (S. P.)

LOUIS DEL SESTO, PROVIDENCE, R. I. v. THE R. V. DUBLIN CO., JACKSONVILLE, TEXAS.

Violation charged: Failure to deliver a carload of tomatoes in accordance with contract.

Principal point involved: Replacement purchase, if made, must be made within reasonable time after rejection.

Order: Complaint dismissed.

Outline of Facts

On or about June 16, 1938, through a broker, respondents sold to complainant one carload (650 lugs) of U. S. No. 1 tomatoes at \$1.35, or \$877.50 delivered. Shipment was made from Texas to Providence, R. I. The record showed that the car was placed on team track where the tomatoes became available for inspection during the early morning of June 23 and on that date respondents were notified of the rejection by complainant, for the alleged reason that the tomatoes did not grade U. S. No. 1. Complainant purchased a replacement of 650 lugs at \$1.65 per lug f.o.b. Providence and paid \$195 in excess of what he would have paid for respondents' shipment had it conformed to warranty, which amount he sought to recover.

Respondents' answer was in effect a general denial of liability. An order was entered, dated March 13, 1939, holding that the tomatoes failed to grade U. S. No. 1 and awarding complainant damages in the amount of \$195. This decision was published April 7, 1939 (page 1699). Thereafter respondents petitioned for a reconsideration of the decision. Since it appeared from the report of investigation made by the Bureau that the replacement carload was purchased by complainant on June 30 instead of June 25, 1938, the petition was granted.

Ruling included in Decision

When a seller, as in this case, fails to deliver produce that conforms to warranty, the buyer may refuse to accept the inferior produce and go upon the market and buy other produce of the kind that should have been delivered, and may recover the difference between the contract price and the amount paid for the replacement lot, but where the buyer elects to make a replacement purchase such replacement must be made within a reasonable time after the seller's breach. In the instant case, it appears that the replacement purchase was not made until June 30, 1938, approximately seven days following notice by the complainant of the rejection. It is concluded that, under the facts and circumstances of this case, it cannot be said that the replacement purchase was made by the complainant within a reasonable time following notice of the rejection. It follows that an order must be entered dismissing the complaint.

S-2203, May 1, 1939, Docket 2889: (Hearing)

H. A. SPILMAN, WASHINGTON, D. C. v. LOUIS SPECTOR & CO., PHILADELPHIA, PA.

Violation charged: Failure to keep proper records pertaining to joint account shipments of produce, or to present them to Departmental investigator on request.

Principal points involved: Failure to keep records in accordance with Sec. 9 of the act is flagrant violation.

Order: Respondent's license suspended for 90 days, effective upon further violation of act or regulations within three years.

Outline of Facts

Disciplinary complaint was filed by H. A. Spilman, an employee of the U. S. Department of Agriculture, based on the following:

During May, 1937, Kaler Produce Co. shipped from various points in Florida and Georgia 14 truckload and carload lots of beans, cucumbers, peppers, tomatoes, eggplant and squash to respondents, at Philadelphia, Pa., all of which, with the exception of one truckload which was sold for the shipper on commission, were sold by them for the joint account of the parties. Respondents issued accounts sales covering the shipments, which showed a balance of \$1,482.41 due the shipper. In June, 1937, the shipper made complaint to the Department questioning the accuracy of the accountings relating to the several truckload shipments.

Personal investigation of respondent's records concerning these transactions was made by a representative of the Department, and testimony for both complainant and respondents was offered at the hearing held at Philadelphia, Pa., on July 27, 1937. The evidence showed that the accounts, books, records and memoranda of the respondents, relating to the several transactions described in the complaint, were insufficient (1) to preserve suitable identification of the sales from separate lots of produce received by respondents in their operations as licensees; (2) that they failed to issue consecutively numbered sales tickets at the time of sale covering sales from trucklots, or to segregate and file sales tickets issued by them either by dates of sale or in the order of serial numbers, and failed to maintain or present to the investigator on request suitable records which would enable him to verify payments received both on cash and charge sales; (3) that their accounts and records were insufficient to "fully and correctly disclose all transactions involved in" their business; (4) that they were notified concerning the insufficiency of their accounts, books and records, and failed to correct such deficiencies.

Ruling included in Decision

Respondents' failure to correct the deficiencies in their records and observe the requirements of section 9 of the act was and is a flagrant violation of its provisions. License No. 5439, issued to Louis Spector and Sam Kovolski, doing business as Louis Spector & Co., was therefore suspended for 90 days, effective upon further violation of the act or regulations within a period of three years.

S-2218, June 2, 1939, Docket 3190: (S. P.)

WESCO FOODS CO., CHICAGO, ILL. v. PAUL BISESI,
INDIANAPOLIS, IND.

Violation charged: Unjustified rejection
of a carload of apples.

Principal points involved: Buyer's complaint as to size of apples indicated intention not to accept; incorrect wiring of size shown by inspection certificate made contract voidable; apples mostly 2-1/8" to 2-3/8" not good delivery as mostly 2-1/4" to 2-3/8"; under sale "subject approval wired Government inspection," seller required to wire facts correctly.

Order: Dismissed complaint.

Outline of Facts

On April 5, 1938, complainant, through its agent in Indianapolis, received respondent's order for a carload of Winesap apples, consisting of 756 boxes, to be shipped from the State of Washington and to range in size from 234 to 262 apples per box. Complainant wired its agent on April 7 that the car had been shipped to respondent and that Government inspection showed "size generally 2--2-1/2 mostly 2-1/4--2-3/8", and its agent informed complainant at Chicago that "Bisesi says inspection O.K." Complainant issued a so-called confirmation of sale dated Chicago, April 7, describing the apples as "756 boxes 'School Boy' Winesaps--Jumbo Pack 30 cents per box f.o.b. ship. point, Combination Extra Fancy and Fancy". It was further specified as a "special agreement" that the sale was "f.o.b. shipping point acceptance on wire Government inspection." The car arrived at Indianapolis on April 15, on which date respondent made partial inspection and informed complainant's agent as to his impression that the apples "were very poor," and the following day, after further inspection and after receiving a copy of a Federal inspector's certificate of inspection showing an average of 263 apples per box, that the size did not conform to complainant's size specifications. Complainant made resale to another purchaser and asked for an award in the amount of the invoice price, plus a deficit that resulted from resale claiming the rejection was unjustified as the purchase was "f.o.b. shipping point acceptance" on wired "Government inspection" because, when respondent "received wire covering Government inspection" he "indicated satisfaction" and the contract thereby "became binding upon him," or, in other words, that the contract was based on terms equivalent to "subject approval wired Government inspection." It was also claimed that the rejection was not made within 24 hours after receipt of notice of arrival.

Respondent stated that he "positively refused" to accept the shipment "on April 15" and advised complainant's agent "that this car was not as quoted and was not acceptable."

After Federal-State of Washington inspection at Tieton on April 7, the inspector certified the size of the apples was "generally 2 to 2 1/2 inches in diameter, mostly 2-1/8 to 2-3/8 inches" and that they graded Washington Combination Extra Fancy and Fancy.

Rulings included in Decision

1. Federal inspection at Indianapolis was made at 10:30 a.m. April 16. While the evidence as to notice of rejection was in dispute, the record did show that respondent's complaint as to the size of the apples indicated an intention not to accept them. His failure to unload and take possession of the shipment, which was known to complainant, amounted to a continued indication not to accept the load as a compliance with contract specifications.

2. The apples furnished by complainant did not conform to complainant's warranty and the respondent did not reject the shipment "without reasonable cause." The term "subject approval wired Government inspection" is deemed to mean that the seller is required to obtain Federal or Federal-State certification, or such private inspection as has been mutually agreed upon, and to correctly communicate by wire or other agreed means the statements on the certificate as to quality, condition and grade, and other essential information, whereupon the purchaser, upon approval thereof, will be deemed to have accepted the commodity without recourse as to quality and condition. The apples in question were certified at loading point as "mostly 2-1/8 to 2-3/8", whereas the complainant, in transmitting the results of the inspection for approval of the respondent, represented the size as "mostly 2-1/4 to 2-3/8 inches". The size of the apples and the numerical count per box apparently were material facts upon which the respondent relied. Since complainant did not correctly communicate the results of the inspection to respondent, it followed that the basic facts, upon which the claimed "f.o.b. subject approval wired Government inspection" provision of the contract rested, were either negligently or mistakenly furnished by complainant. As a consequence, the contract became voidable by the respondent upon his discovery of the true facts. This discovery of the true facts was made through Federal inspection of the apples at Indianapolis the day following arrival of the shipment. The complaint was therefore dismissed.

S-2230, June 16, 1939, Docket 3092: (Hearing)

PIONEER VEGETABLE EXCHANGE, INC., LOS ANGELES, CALIF. v.
FANNING & HOUSNER, RIVERHEAD, L.I. N. Y.

Violation charged: Failure truly and correctly to account in connection with a joint account agreement involving 14 carloads of cauliflower and broccoli.

Principal points involved: Unjustified rejection and loss occasioned thereby must be proved; claim for damages to cover loss sustained in handling produce on joint account must be supported by proof of loss.

Order: Complaint dismissed; counter-complaint dismissed.

Outline of Facts

The facts as established by wires quoted in the decision in this case were as follows:

On or about December 9, 1937, Mr. Irving B. Hudson, as manager of respondent's office at Chicago, Ill., entered into an agreement with complainant on behalf of respondent to handle shipments of cauliflower and broccoli on joint account, complainant to wire Hudson the location and car numbers of shipments in transit and Hudson to divert them to designated destinations generally after stopping them at Chicago for inspection. Eight carloads of cauliflower which had been shipped from loading points in California were thereafter diverted in transit to points designated by Hudson, and complainant acknowledged receipt of payment for six of the shipments which were accepted. Objection was raised by Hudson to two of the shipments, which by agreement between the parties were thereafter handled by Hudson for the account of complainant at a claimed loss of \$114.76 to respondent. Respondent also claimed a loss of \$837.29 on the 6 shipments for which drafts were honored, but no proof was offered in support of the claimed losses. The remaining six carloads of cauliflower and broccoli were shipped by complainant from California to points designated by Hudson, but respondent thereafter refused to handle them unless allowed to deduct half of the deficit claimed, but not proved herein to have been sustained, on the six shipments for which complainant's drafts were paid. Complainant refused to agree to this and thereafter resold the six carloads of cauliflower and broccoli at a claimed loss of \$721.99, concerning which claimed loss no proof was submitted.

Rulings included in Decision

1. Since complainant failed to submit proof in support of the loss claimed to have been sustained as the result of respondent's rejection of certain of the shipments and also failed to prove that rejection was without reasonable cause, the complaint was dismissed.

2. Since respondent failed to prove that he sustained a loss in handling certain of the shipments under the joint account agreement, the countercomplaint filed by respondent was dismissed.

S-2234, June 22, 1939, Docket 3147: (S. P.)

EDWARDS-PRITCHETT-TILLIS, INC., LAKELAND, FLA. v.
BEN B. SCHWARTZ & SON, DETROIT, MICH.

Violation charged: Unjustified rejection of a carload of grapefruit.

Principal points involved: Complaint by buyer to broker was same as complaint to seller since broker was his agent; since car was out of direct line of haul when quotations resulted in sale car was not a "roller"; shipper not liable for servicing in transit where buyer gave no specific icing instructions.

Order: Complaint dismissed.

Outline of Facts

On May 13, 1938, through a broker, complainant sold to respondents a rolling carload of U. S. Combination Marsh Seedless grapefruit of certain specified sizes at \$829.20 for the load f.o.b. Lakeland, Fla., which had been shipped from Lakeland on May 12 and on the 13th was diverted by complainant to Detroit, Mich., where it arrived at 2:50 A.M. May 17. At about 9:00 A.M. respondents were given written notice of arrival and at noon that day the broker wired complainant of respondents' complaint concerning the shipment. Respondents rejected the car because of decayed condition of the fruit and because it was claimed to have arrived late due to misrouting. The shipment was resold at auction in Chicago, Ill., on or about May 23 for the net sum of \$401.24, or at a loss to complainant of \$427.96, for which an award was asked.

Federal inspection at Detroit, Mich., on May 19, showed that the stock failed to grade U. S. Combination only on account of decay "ranging generally from 2 to 6%, average 4%, decay is Blue Mold Rot in early to well advanced stages."

Findings included in Decision

1. Respondents' rejection was within the required time. The broker, in the capacity of agent for both parties, received a complaint from respondents on the date the shipment arrived at destination, alleging late arrival and also decay in the grapefruit. Respondents requested Federal inspection at Detroit at the suggestion of the broker, and the broker also was aware of the fact that Federal inspection could not be made on May 17 or May 18, and sanctioned inspection at the late date of May 19, 1938. Since the broker was also the complainant's agent, the respondents' action on the date of arrival, in complaining to the broker, was the same as registering complaint to the complainant. Under these circumstances the respondents registered objection to the shipment with the broker, representative of both parties, and such objection was made promptly. Regardless of the apparent fact that Federal inspection was not definitely requested by respondents until about 11:00 a.m. May 18, or more than 24 hours after receipt of notice of arrival, acceptance was refused promptly on May 17, and the subsequent actions of respondents were sanctioned by the broker in the capacity of agent for both parties to this proceeding.

2. The record showed the car was serviced with initial ice at shipping point and shipment made under standard ventilation. The contract did not specify that after the car was serviced with initial ice it was necessary to keep the hatch covers closed and plugs in to destination. Since respondents were silent in regard to specific icing instructions, their contention that complainant failed to comply with contract in this respect could receive no consideration.

3. The record disclosed that respondents examined the shipment upon arrival and made a verbal report to the broker, after which the latter wired complainant that the grapefruit showed 2% decay. In accordance with approved trade practices, citrus fruits may show 3% decay at destination and still constitute good delivery. The decay reported by the broker on the date of arrival was within this tolerance. Federal inspection was not made until May 19, or two days after the shipment arrived at Detroit, and at that time decay averaged 4%. However, since the grapefruit showed only 2% decay upon arrival at destination, and since no evidence was furnished to overcome authoritative inspection at shipping point evidencing compliance with contract specifications as to grade, the shipment met contract specifications as to quality and condition at the time physical delivery was tendered to respondents at Detroit.

4. The record showed the shipment was under billing at Lakeland by the Atlantic Coast Line Railroad Co. on May 12, consigned to the complainant at Waycross, Ga. On May 13, at 2:23 p.m., the complainant ordered the shipment diverted to itself at Savannah, Ga. At 9:50 p.m. on the same date and while the shipment was under further diversion to complainant at Richmond, Va., complainant ordered diversion to itself, advise respondents, at Detroit, and the routing, as shown on the final diversion order was: ACL, S&A, GaRR, L&N, Big 4, PM. At the time the sale was definitely made to respondents, the shipment was moving from Savannah, Ga., to Richmond, Va., under the complainant's diversion order to the carrier. Diversion, therefore, could not be accomplished to Detroit until after the shipment reached Richmond. The shipment was a "roller", within the meaning of the definition, while in transit from shipping point to Waycross, Ga., and possibly to Savannah, Ga., but at the time the parties reached an agreement on the quotations, the shipment had left Savannah, Ga., under the complainant's diversion order, and was en route to Richmond, Va. Under these circumstances, the shipment was not a "roller", moving over a route in line of haul between shipping point and Detroit, Mich., at the time the quotations resulted in an actual sale to respondents. Complainant therefore did not tender a roller and as a result breached the contract. The complaint was therefore dismissed.

S-2235, June 28, 1939, Docket 3053: (S. P.)

FLAGLER COUNTY GROWERS ASSOCIATION, BUNNELL, FLA. v.
E. T. TRANNHAM AND CURTIS TRANNHAM, ASHEVILLE, N.C.

Violation charged: Failure truly and correctly to account for shipment of cabbage.

Principal point involved: Inability to locate respondent results in dismissal of complaint.

Order: Complaint dismissed without prejudice.

Outline of Facts

Complaint was filed under the Perishable Agricultural Commodities Act alleging that respondents, partners, trading and doing business at Asheville, had failed truly and correctly to account to the complainant for the agreed purchase price of interstate shipments of cabbage.

Ruling included in Decision

The record showed that Curtis Trantham was not engaged in the produce business as a partner of E. T. Trantham, but was only employed by him. Repeated efforts to serve a copy of the complaint on E. T. Trantham, shown to be the responsible party, were unsuccessful. The complaint was therefore dismissed without prejudice.

S-2236, July 10, 1939; Docket 3054: (Hearing)

JAMES TOZZI & CO., STOCKTON, CALIF. v. A. ALOISI,
CHELSEA, MASS.

Violation charged: Unjustified rejection of four carloads of grapes.

Principal points involved: Contract is divisible when it covers several cars to be paid for by separate drafts; party not bound by unauthorized act of agent; proof of valid and binding contract required.

Order: Complaint dismissed.

Outline of Facts

Complainant alleged that during the grape season of 1937, he sold 34 carloads of grapes to respondent's California buyer, Mr. Bonfiglio, all of which were accepted and paid for by respondent, but that respondent rejected four of five carloads of Muscat grapes allegedly purchased from complainant on Oct. 19, 1937. The five cars were tendered to respondent who, on or about Nov. 2, accepted and paid for one of them, but refused to accept the other four. They were thereafter sold by complainant for a sum which was \$1195.06 less than that for which they were claimed to have been sold to respondent. Complainant asked for an award of \$1195.06.

Respondent contended that while Bonfiglio was in partnership with respondent during the 1937 California grape season, complainant knew that Bonfiglio had limited authority to make purchases and that "Every act of the said Bonfiglio was subject to the final approval of the respondent." He admitted accepting and paying for one carload, but contended that it was not known at the time of such acceptance that this was one of the five cars shipped by complainant as stated in the wires quoted below.

No proof was offered in support of the contentions of either of the parties regarding prior transactions, and the following two telegrams, sent on or about Oct. 19, 1937, contained the only evidence submitted by complainant in support

of his claim that the five carloads were purchased by respondent:

JAMES TOZZI, STOCKTON, CALIFORNIA. RECEIVED YOUR WIRE CANNOT ACCEPT TEN CARS HAVE ENOUGH FOR NEXT WEEK WILL TAKE FIVE MUSCATS FROM REEDLEY LATER SHIPMENT AT 34 DOLLARS SAME LAST TEN CARS WOULD LIKE TO PAY MORE BUT MARKET LOWER AND DONT LOOK TOO GOOD PLEASE NOTIFY BONFIGLIO OF THIS WIRE ANSWER POSTAL TELEGRAPH. A ALOISI

A ALOISI, 188 BROADWAY, CHELSEA, MASS. ANSWERING REEDLEY MUSCATS WORTH TEN DOLLARS MORE THAN ARMONA TALK WITH BONFIGLIO TAKEN LAST FIVE CARS I SHIPPED FROM REEDLEY AT 35 DOLLARS FOB (car numbers and dates shipped) MAILING INVOICE. JAMES TOZZI

Ruling included in Decision

The record contained no proof that the parties entered into a valid and binding contract for the purchase and sale of these shipments. As shown by above-quoted telegrams, respondent offered to purchase five carloads of grapes at \$34 per ton. Complainant would not accept this offer but replied, stating that he was shipping the five carloads of grapes at \$35 per ton which he indicated was in accordance with some agreement entered into with Bonfiglio. No proof whatever was submitted to show that Bonfiglio had any authority to enter into such an agreement and respondent emphatically denied that any purchases were made from complainant, through Bonfiglio, without subsequent confirmation by respondent. Regardless of why the one shipment was accepted by respondent, such acceptance had no bearing on the alleged contract. It has been repeatedly held, in decisions under the Perishable Agricultural Commodities Act, that a contract for the purchase and sale of several carloads of produce which are to be paid for by separate drafts is divisible. This position is sustained by decisions rendered by courts in various jurisdictions. In this connection, particular attention is called to *Czaenikou-Rionda v. West Market Grocery Co.*, 21 F. (2d) 309, and *Portfolio v. Rubin*, 233 N. Y. 439, 135 N. E. 843. The complaint was therefore dismissed.

S-2240, July 12, 1939, Docket 3011: (S. P.)

PHILLIPS PRODUCE CO., TULSA, OKLA. v. WESTERN FRUIT
GROWERS, INC., LOS ANGELES, CALIF.

Violation charged: Failure to deliver
oranges which conformed to specifications.

Principal points involved: Failure to re-
ject within 24 hours prevents considera-
tion of buyer's claim for damages because
of condition of produce.

Order: Complaint dismissed.

Outline of Facts

On or about Dec. 30, 1936, E. L. Phillips, then trading as E. L. Phillips Company, and the respondent, through a broker, entered into a contract, which was subsequently transferred to complainant, for the purchase and sale of a carload of Navel oranges at delivered price. The oranges were shipped from Los Angeles, Calif., to Tulsa, Okla., where they arrived at 11:45 a.m. Jan. 17, the consignee being notified at 8:30 a.m., Jan. 18. The oranges were rejected by complainant because they did not conform to the specifications of the contract of purchase and sale, and reparation for damages sustained was requested.

Federal inspection certificate showed that on Jan. 18 "Stock is mostly firm; 10% to 40%, mostly 15% to 25% of Oranges scattered throughout boxes and load show soft mushy condition of pulp with slightly bitter or fermented flavor, white crystals between segments. ***Inspection and certificate restricted to accessible part of load consisting of boxes next doors and in top layer."

The Bureau of Agricultural Economics caused an investigation to be made in connection with this complaint and a copy of the report of investigation was served on the parties by registered mail. In an affidavit furnished by the complainant and attached to the report of investigation as an exhibit the statement was made: "The car was refused at 3:10 p.m., Jan. 19, 1937, as shown by exhibit 10 to complainant's petition." Exhibit 10 was a wire sent by the broker to the respondent advising that the car had been rejected.

Ruling included in Decision

The oranges were not rejected by complainant within twenty-four hours from the time of notice of arrival and, therefore, the complaint was dismissed.

S-2244, July 15, 1939, Docket 3246: (S. P.)

SAM ANDREWS, LOS ANGELES, CALIF. v. JOE MACALUSO CO., CHICAGO, ILL.

Violation charged: Unjustified rejection of two carloads of carrots.

Principal point involved: Purchase by buyer's agent "f.o.b. acceptance" on guaranteed advance bars rejection by buyer and makes him liable for amount of advances.

Order: Complainant awarded \$345.57, plus interest; publication of facts.

Appeal: Federal District Court reversed and set aside Secretary's order.

Outline of Facts

On April 26, 1938, respondent's agent went to complainant's office and telephoned respondent's Chicago office concerning two carloads of carrots then in transit from King City, California. The testimony contained in the record was highly conflicting concerning what was said during this telephone conversation but it appeared that an agreement was entered into whereby respondent was to accept the two carloads of Old Faithful Brand carrots, shown by shipping point inspections on April 20 and 21 to grade approximately 90% U. S. No. 1, on a guaranteed advance of \$250 per carload. During the evening of the same day respondent wired complainant: "IN ADDITION TO CARROTS BEING GOOD QUALITY GREEN TOPS WANT IT UNDERSTOOD SAM GOOD MEDIUM SIZE NO BABY CARROTS OTHERWISE QUALITY AS HERMAN DESCRIBED TELEPHONE." This specification was apparently satisfactory to complainant, who, so far as the record disclosed, failed to reply. On that same day respondent's agent signed two non-negotiable sight drafts for \$250 each, payable to complainant, each specifying a car number and stating: "payment for which is covered by this draft is hereby accepted f.o.b. shipping point at the total cost shown on the face hereof without recourse against the drawer." Immediately upon consummation of the agreement, complainant diverted the two cars to Chicago. Respondent rejected them both (one prior to arrival at destination). Complainant made resale for the net sum of \$134.43, or at a loss of \$345.57, and asked for an award in that amount.

Ruling included in Decision

The two shipments were up to contract requirements at the time and place of shipment and respondent's rejection was without reasonable cause. It was definitely shown that respondent's agent accepted these two carloads under an agreement specifying "f.o.b. acceptance." It has been repeatedly held in decisions under the Perishable Agricultural Commodities Act, based upon paragraph 12 of regulation 8 promulgated under the act, that such agreement

bars the consignee from any right of rejection. He must accept the produce and, unless he can show that it was not as represented at the time and place of shipment or was in an unsuitable shipping condition, he is liable for the full amount of the contract purchase price or, in the instant case, for the guaranteed advance. Complainant was therefore awarded \$345.57 plus interest.

Appeal

Respondent filed an appeal to the Federal District Court in August, 1939. The Court on February 12, 1940, reversed and set aside the Secretary's Order, holding that appellee (the complainant) had failed to prove that Herman Finck was the duly authorized agent of respondent or had implied or actual authority to execute the drafts on behalf of respondent or to bind respondent to the terms and conditions therein set forth.

S-2249, July 22, 1939, Docket 3342: (S. P.)

H. A. SPILMAN, WASHINGTON, D. C. v. WILLIAM SHAPIRO, INC.,
NEW YORK, N. Y.

Violation charged: Failure to keep adequate records; the making of a misleading statement in connection with interstate shipments of produce.

Principal point involved: Failure to keep required records was violation of section 9 of the act, warranting suspension of license.

Order: Respondent's license suspended for 90 days, effective only upon further violation of the act within three years.

Outline of Facts

On or about October 19, 1938, administrative officials in the Department of Agriculture received information indicating that the respondent had made a false or misleading statement to the Turlock Fruit Co., of Turlock, California, in connection with the handling of 17 interstate carload shipments of melons handled on consignment by respondent. An investigation was thereafter made of respondent's books and records, which were found to be incomplete. The original sales tickets covering the transactions under investigation could not be located by the respondent's clerks and bookkeepers for several hours and, when finally produced, were found to be incomplete and made out in such a manner as to render it impossible for the investigators to determine which sales tickets represented sales from any particular shipment. The information secured from the respondent's books and records was so incomplete that the investigators were unable to make a definite report concerning the prices actually received by the respondent for these melons.

Respondent filed a waiver of hearing and admitted failure to keep the accounts, records and memoranda, as alleged in the complaint.

Ruling included in Decision

Respondent's admitted failure to keep such accounts, records, and memoranda as are required by the Perishable Agricultural Commodities Act, 1930, as amended, was a violation of section 9, warranting suspension of respondent's license for a period not to exceed 90 days. It was therefore ordered that respondent's license No. 57320 be suspended for 90 days but will be effective only upon the issuance of a supplemental order at any time within 3 years from July 22, 1939, if the Secretary has reason to believe that respondent has, within those three years, again violated any of the provisions of the act or the regulations.

S-2260, October 4, 1939, Docket 3172: (Hearing)

SPRINGFIELD FRUIT & PRODUCE TRADE ASSOCIATION, SPRINGFIELD, MASS.
v. SCHWARTZ FRUIT & PRODUCE CO., SPRINGFIELD, MASS.

Violation charged: Failure to account for contract purchase prices of numerous lots of perishable agricultural commodities.

Principal point involved: Complainant must prove interstate character of shipments involved.

Order: Complaint dismissed.

Outline of Facts

Informal complaints were filed by four different parties on May 14, 1938, who thereafter assigned their claims to the Springfield Fruit & Produce Trade Association, which filed a formal complaint on September 29, 1938, charging respondent with failure to account for the contract purchase prices of numerous lots of perishable agricultural commodities purchased by the respondent from said assignors during the period from September 20 to December 14, 1937.

Respondent's answer admitted that respondent failed to pay the agreed purchase price for practically all of the produce involved, but denied that the purchases were transactions in interstate commerce and contended that the complaint was not filed within the nine months' period allowed in the act.

Rulings included in Decision

1. Respondent's motion to dismiss the complaint, on the ground that it was not filed within the statutory period of time, was properly overruled by the examiner. The informal complaints were filed on May 14, 1938, and with the time allowed. It was permissible, therefore, to file the formal complaint at a later date.

2. Testimony adduced at the hearing disclosed that the respondent made frequent purchases, in Springfield, Massachusetts, of small lots of produce for resale in the State of Massachusetts, and there was no showing that respondent took delivery of any of the produce here involved in interstate commerce. For this reason the complaint was dismissed.

S-2271, November 7, 1939, Docket 3344: (Hearing)

Re: Application of A. N. Bearman, Minneapolis, Minn., for a license under the Perishable Agricultural Commodities Act.

Order: Applicant granted a license.

Outline of Facts

On May 19, 1939, the Secretary issued a notice of hearing and order to show cause why the application of A. N. Bearman for a license under the Perishable Agricultural Commodities Act should not be denied, alleging that the Bearman Fruit Co. of Minneapolis, Minnesota, and the Bearman Fruit Co. of St. Paul, Inc. (both licensees under the act) purchased fresh fruits and fresh vegetables in interstate commerce for which, in violation of the act, they failed truly and correctly to account promptly to the persons with whom such transactions were had. A hearing was held on May 31, 1939.

The applicant claimed he was not guilty of any violation of law which would authorize a denial of his application for a license as a broker.

Order

It was ordered that the applicant should be granted a license as requested in the application.

S-2280, December 13, 1939, Docket 3302: (S. P.)

STERLING H. NELSON CO., SALT LAKE CITY, UTAH. v.
DAVIS BROS., CHICAGO, ILLINOIS.

Violation charged: Unjustified rejection
of two carloads of onions.

Principal points involved: Failure to
H-4 bill shipment at agreed price was fail-
H-26 ure to tender goods in conformity with
H-38 contract, and rejection would not have
H-14 been without reasonable cause; buyer's wire
objecting to quality and size but asking
"what want us do" was not rejection;
failure to release shipment not rejected
was failure to deliver.

Order: Complaint dismissed; counter-
complaint dismissed.

Outline of Facts

By letter dated August 20, 1938, respondent asked complainant to quote prices on large size Spanish onions. By letter of August 25, complainant quoted 45¢ per 50-lb. bag for grade U. S. No. 1 "sweet yellow Spanish onions" f.o.b. Utah shipping point, size 3 inches and larger, and specified that shipment would be made "as fast as possible, by September 15." Respondent then wired complainant to "confirm 2 cars this week's shipment USOME three larger," and complainant replied it had "nothing to offer for shipment this week" and that the best that could be done was to ship as "fast as possible" but not later than September 15. Respondent replied August 30 by wire saying "Okay book couple get started, ship soon possible, confirm." On August 31 complainant, by wire, offered to ship 2 cars, of 600 bags of 50 lbs., grade U. S. No. 1, 3 inches in diameter and "up... our option by September 30" at 45¢ net f.o.b. shipping point, certificate to be furnished and 2 additional cars for shipment not later than September 15, at 50¢ per bag net, f.o.b. loading point "acceptance final." Respondent counter-offered to take the 4 cars "subject approval detailed Federal Inspection Certificate by wire." Complainant declined to "book" the four carload order, subject to approval by wire of Federal inspection, and respondent then wired: "...okay four cars f.o.b. acceptance final." Thereafter complainant shipped from Utah loading points on September 15, 2 carloads of onions, which arrived at Chicago on September 20.

Complainant alleged that it sold a total of 4 carloads of onions to respondent and shipped 2 carloads in conformity with sales specifications, which respondent rejected.

Respondent alleged that on August 30 he unconditionally accepted complainant's offer of 2 carloads of onions at 45¢ per 50-lb. bag f.o.b. Utah loading point and thereafter purchased 4 additional carloads, 2 for delivery not later than September 15 and 2 for delivery not later than September 30, at 50¢ and 45¢ per bag, respectively; that upon arrival at Chicago of the 2 carloads first purchased, respondent complained "about the quality of the onions... but did not reject or refuse" to accept them and was willing to accept the 2 loads on the contract of purchase of August 30. Respondent filed a countercomplaint for damages, based on the claimed refusal of complainant to release the 2 carloads at the agreed purchase price of 45¢ per bag. It was claimed that the market price of Western Spanish onions, U. S. No. 1, 3 inches and larger, at Chicago on September 20 and for a period of several weeks thereafter; was \$1 to \$1.15 and that if the 2 cars had been released in accordance with contract respondent would have been able to realize \$645 on each car; that the cost of onions to respondent would have been 45¢ per bag, plus 42¢ per bag freight charges, or a total of \$522 per car and that respondent would, therefore, have realized a profit amounting to \$123 per car, or a total of \$246.

Rulings included in Decision

1. Complainant contracted to ship 2 carloads of U. S. No. 1 onions, 3 inches in diameter or larger, at 45¢ per 50 lb. bag f.o.b. Utah loading point, shipment to be made not later than September 15. Respondent's wire "...okay four cars fob acceptance final" was an acceptance of complainant's offer of August 31. While it seemed clear that respondent considered his wire of August 30 as an acceptance of the complainant's prior offer, yet by the use of the concluding word "confirm," it seemed that a confirmation, although unnecessary, was expected. Unless use of the word "confirm" amounted to a conditional acceptance, it should be disregarded. Use of the word could have been intended as a request for confirmation of shipping dates not later than September 15, but apparently was simply an expression of a request that the respondent be assured as to the receipt by the complainant of his acceptance of the price offer. After respondent's acceptance of the complainant's offer to ship 2 carloads at 45¢ per bag, f.o.b. shipping point complainant could not, of course, raise its offering price or advance the date on or before which it was previously specified that shipment would be made.

2. Two cars were shipped from Utah loading points September 15, but complainant invoiced the onions at 50¢ per bag and respondent was required to pay that amount in order to get possession. It will, therefore, be seen that the complainant failed to tender the two loads in conformity with the contract of sale. Under these circumstances, it could not be said that respondent's rejection, if a rejection in fact occurred, was without reasonable cause. Moreover, there was no proof in the record that the

respondent did refuse to accept the two loads. It was true that respondent wired on September 20 that the two cars had "arrived you know better trying push this quality size down our throat be decent what want us do we gave you plenty notice our letter 29." The statements made were obviously not justified, nevertheless it could not be said that the wire constituted a rejection of the onions, especially in view of the respondent's question "what want us do" and the complainant's answering wire the same day insisting that the draft be paid or complainant would sell the onions for the respondent's account. So far as the record disclosed all communication between the parties terminated at this point. The complaint was therefore dismissed.

3. Complainant's failure to deliver or "release" the onions at Chicago was a failure to deliver carload quantities. What the respondent might have realized in profits by selling the onions in jobbing quantities was both speculative and not a proper measure of damages. The countercomplaint was therefore dismissed.

S-2281, December 13, 1939, Docket 3285: (S. P.)

W. CALVERT CULLEN, Jr., PAINTER, VA., v. M. DUNN & CO.,
DETROIT, MICHIGAN.

Violation charged: Unjustified rejection
of a carload of potatoes.

H-26
H-10 Principal points involved: Buyer's withholding of consent to release after rejection, pending consideration of legal consequences, did not constitute acceptance; delayed arrival and failure to meet grade specified made rejection justified.

Order: Complaint dismissed

Outline of Facts

On July 8, 1938, through a broker, respondent purchased from complainant a carload (300 sacks) of U. S. No. 1 potatoes at \$1.38 per 100 lb. sack delivered Detroit, Michigan, the potatoes having been shipped from Pocomoke, Md., on July 7, consigned to complainant at Pitcairn, Pa., the memorandum of sale specifying no time of arrival at Detroit for inspection and delivery although the usual running time would have permitted arrival on July 12. Following the sale, complainant diverted the shipment in transit to respondent at Detroit, where it arrived on July 14 and was made available for inspection, acceptance and unloading by respondent at approximately 7 a.m. Respondent refused to accept the potatoes because of delay of two days in arrival of the car at Detroit. As a means of establishing a proper basis for filing of claim against the carrier, it was tentatively agreed between respondent and the broker that the car would be forwarded to Detroit Union Produce Terminal for

prompt resale through another broker. The broker filed a diversion order but, since the car was consigned to respondent, it was necessary for respondent to consent to diversion, and giving of that consent was delayed until 3:15 p.m. July 18, pending consideration of legal consequences, the car being delivered on or about July 19. Resale resulted in net proceeds of \$91.03. Complainant asked for damages, alleging unjustified rejection.

The potatoes were inspected by a Federal-State inspector at shipping point on July 7 and then graded U. S. No. 1. Federal inspection at Detroit on July 15 showed that "most sacks" showed "less than 1% to 2% Slimy Soft Rot, some 4%, some no decay, averaging approximately 1%" and that the potatoes failed to grade U. S. No. 1 "only account decay in some sacks."

A copy of the complaint was served on respondent, but no answer thereto was filed.

Rulings included in Decision

1. Respondent's rejection of the shipment was justified. This was a delivered sale, but the contract did not specify a date of delivery. However, the evidence clearly established the fact that the car arrived at its destination two days late, and that the market was in such condition that the respondent could not handle the car at that time. The evidence disclosed also that the lot as a whole failed to grade U. S. No. 1.

2. Respondent's withholding of his consent to release did not constitute an acceptance. It was shown that after giving prompt notice of the refusal to accept the shipment, the respondent did not retract or cancel its rejection but attempted to assist the broker in making a resale by requesting the carrier to deliver the shipment to a point convenient for resale. It was the respondent's understanding that this resale was for the account of the complainant. Upon being informed that the resale was to be made for his account the respondent withheld the release. Subsequently, he signed a release. When respondent rejected the car in the first instance the original contract was at an end. Apparently the respondent was endeavoring to cooperate with the broker in making such disposition of the shipment as would be most advantageous to the complainant. There was no new binding agreement. The respondent withheld his consent to the release in order to make his position understood in respect to the arrangement for the diversion. Any delay, therefore, which may have been occasioned in making delivery for resale was apparently due to the method which the broker chose for effecting delivery rather than any interference on the part of the respondent. Under those conditions, no reason could be found for holding the respondent liable for any loss which might have been sustained by complainant in connection with the transaction under consideration.

S-2288, December 15, 1939, Docket 3185: (Hearing)

CLOTHO GRAPE DISTRIBUTORS, CALWA, CALIF. v.
MARTINO BROTHERS, AUBURN, N. Y.

Violation charged: Failure to account
for four carloads of grapes.

L-5 Principal point involved: Department
without jurisdiction in complaint
against a company not subject to
license under the act.

Order: Complaint dismissed.

Outline of Facts

The complainant alleged that on or about September 25, 1937, John Martino, acting as agent for the respondents, purchased 4 carloads of Muscat grapes at \$32.50 per ton for 3 carloads and \$33.50 per ton for one carload, all f.o.b. Clotho, California; that the grapes, which were inspected and accepted for respondents at loading point by John Martino, were thereafter shipped by complainant in interstate commerce, as directed by him; that 3 shipments were accepted by respondents at Auburn, N. Y. and one at Syracuse, N. Y., but the agreed purchase price, totalling \$2163.51 for the 4 carloads, was not paid to complainant, who brought this proceeding for the recovery thereof.

Respondents introduced testimony to show that the partnership firm of Martino Brothers consists of Nick Martino and Patsy Martino; that John Martino and Tony Martino never were partners; that Mary Martino acted only under a power of attorney; and that the partnership firm of Martino Brothers is not subject to the provisions of the Perishable Agricultural Commodities Act since the partners are retailers receiving less than 20 carloads of produce in any one year, none of which is handled on commission.

Ruling included in Decision

Since an investigation made after the hearing by the Agricultural Marketing Service indicated that the respondents were not at that time, nor during the year 1937, dealers within the meaning of the act, the complaint was dismissed, without prejudice, for lack of jurisdiction.

S-2302, February 9, 1940, Docket 3338: (Hearing)

RE: Application of Fleming Newton, Jacksonville, Texas, for a license under the Perishable Agricultural Commodities Act

Principal point involved: Whether applicant was unfit to receive a license under the act.

Order: Notice of hearing and order to show cause dismissed; that a license be issued to applicant.

Outline of Facts

Following the application of Fleming Newton for a license under the Perishable Agricultural Commodities Act, the Acting Secretary of Agriculture issued a notice of hearing and order to show cause why a license should not be denied because of the fact that he, as President and General Manager of Newton & Wallace, Inc. (duly licensed under the aforementioned act), was actively engaged in the management and affairs of the corporation and responsible, in whole or in part, for the corporation's failure to deliver produce in accordance with a contract previously entered into with Green Bros. Fruit & Produce Co., Denver, Colorado, and the failure of the corporation truly and correctly to account in connection with the handling of produce by it, which failures were alleged to constitute flagrant and repeated violations of section 2 of the act.

A hearing was held and exceptions filed by the Agricultural Marketing Service and a reply thereto by the applicant were considered.

Ruling included in Decision

The evidence did not disclose that the applicant is unfit to receive a license under the act. The notice of hearing and order to show cause was therefore dismissed and a license to handle perishable agricultural commodities in interstate commerce was ordered issued to the applicant.

S-2303, Feb. 9, 1940, Docket 3493: (Hearing)

Re: Application of W.J. Piowaty, Chicago, Illinois, for a license under the Perishable Agricultural Commodities Act.

K-9

Principal point involved: Engaging in practices prohibited by act, while an officer of corporation operating without a license, and making materially false and misleading statements in application for license, showed applicant unfit to engage in business and sufficient grounds for denial of license.

Order: License denied.

Outline of Facts

Following the application on October 27, 1939, of W. J. Piowaty for a license under the Perishable Agricultural Commodities Act, an investigation was made by a representative of the Department of Agriculture and there was issued a notice of hearing and order to show cause why a license should not be denied.

It was alleged in the order to show cause that Piowaty Bros. of Texas, Inc., failed truly and correctly to account promptly to sixteen growers and shippers for perishable agricultural commodities purchased during the time the corporation was engaged in the general business of buying such produce for interstate shipment. These allegations were supported by dishonored checks drawn by the corporation, signed by W.J. Piowaty, in payment for produce, and affidavits of creditors that the debts had not been paid. The evidence showed that the applicant, during the last quarter of 1937 and the first half of 1938, was President of Piowaty Bros. of Texas, Inc., was its principal stockholder, was in active control of its policies, and personally participated in most of its transactions, during which time the corporation engaged in the business of handling fresh fruits and vegetables in interstate commerce without a license in violation of the Perishable Agricultural Commodities Act. On April 25, 1938, the corporation made an assignment of its assets for the benefit of creditors, the assignment by W.J. Piowaty, President, listing and admitting the validity of numerous debts owing to various creditors as the result of failure of Piowaty Bros. of Texas Inc. truly and correctly to account promptly in respect to transactions involving the buying, selling, or consigning of perishable agricultural commodities in interstate commerce. Payments to the creditors have amounted to approximately 5% of the claims approved and the assets remaining to be distributed will not amount to more than an additional 2% of the approved claims.

It was also alleged that the statements of W.J. Piowaty on the application for license were materially false and misleading in that he answered "no" to the question: "If the business is individually owned, have you been responsibly connected with any establishment which, within two years, has been found guilty of a violation

of the Perishable Agricultural Commodities Act?" Five Perishable Agricultural Commodities Act cases were set out in which it had been found that Piowaty Bros. Inc. had violated the act during the time there was reason to believe that W. J. Piowaty was an officer of the corporation. The Government introduced evidence showing that the corporation never filed with the Department of Agriculture notice of a change of officers after the original filing which showed W. J. Piowaty to be Secretary-Treasurer, and showed that W. J. Piowaty was performing the responsible duty of signing checks drawn on Piowaty Brothers Liquidation Company, successor of Piowaty Bros. Inc., as late as December, 1939. The applicant claimed that he tendered his resignation as Secretary-Treasurer of Piowaty Liquidation Co. as of June 1, 1938, but failed to prove it was accepted or actually became effective.

Rulings included in Decision

1. The applicant's defense that he intended to pay the growers and shippers but was prevented from doing so by attachment of funds of Piowaty Bros. of Texas, Inc. by other creditors and the appropriation of said funds to the satisfaction of other debts and delinquent tax charges was not material to the charge that the corporation failed truly and correctly to account promptly. The total amount, 7% of the approved claims, which will be paid is far less than the amount necessary to absolve the corporation from liability. Judicial notice of the Texas statutes was taken at the hearing. They provide, in substance, that where less than 33-1/3% is paid to the creditors, a right of action for the balance survives. Even if there were a possibility that the obligations might be paid to the extent of 33-1/3%, or were it true that some of the creditors do not wish to attempt further recovery against the corporation, which is now barren of assets, the violations of the Perishable Agricultural Commodities Act, by the failure truly and correctly to account promptly would not be mitigated.

2. The fact that W. J. Piowaty admitted having acted in a responsible position, i.e. signed checks drawn on Piowaty Bros. Inc. in 1939, under authority given by the corporation in 1937, did not lend credence to his statement he resigned in 1938. However, it was not necessary to determine that the applicant was an officer of the corporation at the time each violation of the act was found by the Secretary. It was enough that the applicant's own testimony showed that he did not resign or attempt to resign until after orders signed on April 18 and 19, 1938, were issued. The act requires prompt settlement and compromise or payment of a claim after the Secretary has found a violation of the act and awarded reparation does not eliminate the violation of the act or warrant a statement in the application that the applicant has not been connected with an establishment which has been found guilty of violating the act.

3. The Secretary found that the applicant was unfit to engage in business of a commission merchant, dealer or broker by reason of having, prior to the date of the application, engaged in practices of the character prohibited by the act; that he filed an application containing statements which were materially false and misleading; and that such acts constituted sufficient ground upon which to deny his application for a license.

S-2305, February 17, 1940, Docket 3407: (S.P.)

ILLINOIS FRUIT GROWERS EXCHANGE, CARBONDALE, ILL. v.
MILLER BROTHERS CO., INC., MARSHFIELD, WISCONSIN

Violation charged: Failure to pay for a truckload of strawberries.

M-2

Principal point involved: Failure to pay purchase price and to reimburse seller for transportation charges advanced constituted a flagrant violation of section 2.

Order: Complainant awarded \$511.87 plus interest.

Outline of Facts

On May 31, 1939, complainant sold to respondent a truckload of 225 crates of strawberries at \$2 per crate f.o.b., or \$450 for the shipment, complainant to pay the transportation charges, which were subsequently agreed upon as \$61.87, for which it would be reimbursed by respondent. Complainant made shipment from Paris, Illinois, to Marshfield, Wisconsin, where the berries were accepted without objection by respondent and a check for \$511.87, in payment of the agreed purchase price and transportation charges, was given to the truck driver. The bank on which the check was drawn refused to honor it, and no part of the purchase price had been paid by respondent. Respondent failed to file an answer.

Ruling included in Decision

Respondent's failure truly and correctly to account to the complainant for any part of the agreed purchase price for the shipment of strawberries or the transportation charges advanced by the complainant under the agreement between the parties constituted a flagrant violation of section 2 of the act. Complainant was therefore awarded \$511.87, plus interest.

S-2313, February 28, 1940, Docket 3152: (Hearing)

M. CRELINSTEIN & SONS, MONTREAL, CANADA v. S. V. PATTERSON
and/or PATTERSON & ELAM, GREENFIELD, TENN.

Violation charged: Failure to deliver
in accordance with contract a carload
of beans; false and misleading statements.

Principal point involved: Secretary has no
jurisdiction of claims not filed within
9 months after the cause of action accrues.

Order: Complaint dismissed.

C-16

Outline of Facts

On or about June 7, 1937, complainants purchased from S. V. Patterson one carload (1112 baskets) of young, tender first-picking wax and green beans at 75¢ per basket f.o.b. Greenfield, Tennessee. Patterson shipped the beans, which arrived at Montreal, Canada on June 11. Complainants contended that upon arrival the beans showed a wilted and rusted condition and about 700 baskets had to be dumped because they were practically worthless; and that payment was made upon the representation of Patterson that he had a Federal inspection certificate showing the beans graded U. S. No. 1 at shipping point. On July 14, complainants notified S. V. Patterson that a protest had been filed against the railroad because of alleged defective equipment and stated that if Patterson would furnish a Government inspection report, affidavits of farmers from whom the beans were purchased, and information with respect to precooling of the car in which shipped, they would have no difficulty in collecting the railroad claim, and requested that the loss on the car be shared equally. S. V. Patterson refused to make any allowance and requested that his draft be paid, stating he would mail all papers possible to support the complainants' claim. Complainants, by telegram, notified Patterson that without prejudicing their rights they would pay the draft, provided Patterson furnished the information requested. Patterson replied that he was mailing papers to support the claim, whereupon complainants paid the draft for the contract purchase price.

Rulings included in Decision

1. The evidence showed that the contract of sale called for "young, tender first-picking beans." The beans were not sold as U. S. No. 1, nor was a Federal inspection certificate to be furnished. The complainants therefore clearly could not lawfully demand the production of a Federal inspection certificate as a condition precedent to payment.

2. The evidence was insufficient to warrant the inference that the respondents made any statement or took any action for the purpose of misleading or defrauding the complainants. On the contrary, the evidence showed the purchase of a carload of beans by the complainants and the receipt and acceptance thereof, and the attempt on the part of the respondents to obtain payment therefor. It was therefore concluded that the complainants failed to show that the respondents, for a fraudulent purpose, made false and misleading statements.

3. After arrival of the carload of beans at Montreal, Canada, the complainants received, retained and accepted delivery of the beans, and made no complaint until approximately thirty days thereafter, thereby preventing the respondents from protecting themselves by obtaining an inspection. It was not necessary, however, to determine whether the beans met contract specifications, as the complaint was filed on April 18, 1938, more than nine months after the claim arose. Under the act, the Secretary has no jurisdiction of claims not filed within nine months after the cause of action accrues.

S-2321, March 29, 1940, Docket 3416: (Hearing)

Re: Application of Philip Dublin, Brooklyn, N. Y., for a license under the Perishable Agricultural Commodities Act.

A-13 Principal points involved: Failure to
K-9 reject within 24 hours constituted
acceptance; license denied because
applicant was partner in business
when failed to account for purchases
in repeated violations of act.

Order: Application denied.

Outline of Facts

In an order of the Secretary dated January 8, 1940 (H. A. Spilman v. Dorothy Dublin and/or Dublin Produce Exchange) it was stated that the failure of Dorothy Dublin to account for numerous carloads of potatoes shipped to her in interstate commerce during April 1939 constituted repeated violations of the act and that her license would have been revoked if it had not terminated on December 8, 1939. At that time it was not necessary to decide whether Philip Dublin and Dorothy Dublin, his wife, were partners during April, 1939, operating as the Dublin Produce Exchange, but the application of Philip Dublin, on or about June 23, 1939, for a license under the act, to operate in the name of the Dublin Potato Exchange, made necessary a decision on this point. On August 31, 1939 there was issued a notice of hearing and order to show cause.

The testimony was conflicting. Philip Dublin testified he was general manager of the Dublin Produce Exchange, that he had authority to make purchases and sales and that there was no limitation on his authority, but that he was not a partner. A deposition of A. M. Abrahamson, Secretary of the Produce Reporter Co., Chicago, Illinois, stated that that company received from the Dublin Produce Exchange, on or about March 13, 1938, a letter signed by Philip Dublin, requesting that he be supplied with a financial statement form. A form was supplied and the statement was signed by Philip Dublin, indicating that he and Dorothy Dublin were partners. Attached to the deposition as an exhibit was a statement reading in part: "NAME: Owners, Partners or Officers (Show Titles) Philip Dublin Dorothy Dublin" (Government Exhibit No. 9)

Rulings included in Decision

1. Philip Dublin and Dorothy Dublin were engaged in business as partners under the trade name of Dublin Produce Exchange and purchased numerous carloads of potatoes during April, 1939, in interstate commerce.

2. Neither Philip Dublin nor Dorothy Dublin rejected any of the potatoes, which were of the kind and grade specified in the contract of sale, within twenty-four hours after notification of arrival at Brooklyn, N. Y., and such failure to reject constituted acceptance under the act.

3. Philip Dublin and Dorothy Dublin failed to account for the potatoes, which constituted repeated violations of the act. Philip Dublin's application for a license was therefore denied.

S-2336, April 16, 1940, Docket 3319: (S. P.)

L. GILLARDE CO., CHICAGO, ILL. v. TURLOCK FRUIT CO.,
TURLOCK, CALIFORNIA

Violation charged: Failure to pay a deficit incurred in selling a carload of cantaloups.

Principal points involved: Broker entitled to selling charge notwithstanding commissions charged by dealers to whom shipment turned over on shipper's authority; shipper liable for deficit.

Order: Complainant awarded \$163.92, plus interest; publication of facts.

Outline of Facts

On or about August 2, 1938, respondent employed complainant as his broker, with authority to arrange for the disposition to the best advantage of 288 crates of cantaloups shipped from Turlock, Calif., to Chicago, Ill. After wiring respondent "MOST CRATES TOP TIERS CONSIDERABLY SOFT LOWER TIERS GENERALLY FIRM TO SOFT STOP MELONS FULLY RIPE OCCASIONAL DECAY SOME MELONS SHOW FAIRLY HEAVY SLIP MOLD STOP BELIEVE BETTER RESULTS CAN BE OBTAINED BY US DISTRIBUTING THE CAR WITH THREE OR FOUR HOUSES," and believing that the best returns would be obtained by jobbing the shipment, complainant, in accordance with instructions from respondent to "do best possible use your judgment, delivered the cantaloups to three Chicago dealers, who, during the period August 3 to 5, inclusive, sold them for a total which failed by \$163.92 to equal the freight, selling and other charges. Complainant asked for an award in the amount of the deficit sustained.

Respondent did not deny liability for any loss sustained by complainant in handling the cantaloups, but contended that Government market reports indicated that higher prices should have been received, and that he was overcharged for services in making sales, since each of the jobbers charged 10% commission and the complainant charged a \$35 brokerage fee.

Hearing was waived by both complainant and respondent.

Rulings included in Decision

1. The selling charges were reasonable and were by implication authorized by respondent when he employed complainant to make disposition of the shipment. Those whose services were engaged were entitled to recover the customary fees in payment therefor.

2. It was clear that the cantaloups were sold on commission by dealers having no connection with complainant, and, in the absence of proof to the contrary, it was presumed that the highest possible prices were obtained. Moreover, it was definitely shown that the cantaloups were in poor condition and the Government market reports showed that soft and overripe cantaloups were quoted at Chicago, on August 5, which appears to have been within the period during which sales were being consummated, for prices as low as 50¢ per crate. The original accounts sales included in the record showed that 47 crates of melons were sold at prices ranging from \$2 to \$2.65 per crate. The remainder of the melons were sold at from 60¢ to \$1.75 per crate, with the exception of 25 crates which were sold at 40¢. The accounts sales showed that sales of the melons were consummated within the range of prices quoted on the Chicago market during the period they were sold. Complainant was therefore awarded \$163.92, plus interest.

S-2353, May 22, 1940: (S. P.)

Docket 3243, D. P. RAGAN BROKERAGE CO., OMAHA, NEBR. v.
JAC BOKENFOHR, THIBODAUX, LA.

Docket 3244, JAC BOKENFOHR, THIBODAUX, LA. v. AK-SAR-BEN
FRUIT CO., OMAHA, NEBR., AND D. P. RAGAN BROKERAGE CO., OMAHA, NEBR.

Violation charged: Docket 3243 - Failure
to account for brokerage fees; Docket 3244 -
Unjustified rejection of a carload of water-
melons.

Principal points involved: Broker entitled
to fees earned; when contention not sup-
ported by proof, complaint dismissed.

Order: D. P. Ragan Brokerage Co. awarded
\$105, plus interest, against Jac Bokenfohr;
Jac Bokenfohr awarded \$121.83, plus inter-
est, against Ak-Sar-Ben Fruit Co.; com-
plaint dismissed as to liability of D. P.
Ragan Brokerage Co.

Outline of Facts

On or about July 11, 1938, Jac Bokenfohr employed D. P. Ragan Brokerage Co. as his broker to negotiate the sales of 8 carloads of watermelons. Ragan made the sales of the 8 carloads, which were thereafter shipped from loading points in Louisiana to Omaha, Nebr., 7 of which were accepted and one rejected. Ragan filed a claim for \$105 brokerage earned on the sale of the 7 accepted cars. With reference to the eighth car, which was rejected by the Ak-Sar-Ben Fruit Co., the contract entered into through Ragan was for the purchase from Bokenfohr of a carload of watermelons averaging "about 28 lbs. each", without specification as to grade or quality, at the agreed f.o.b. price of 66¢ per cwt. A carload of 961 melons, shown by Federal inspection at loading point to grade U. S. No. 1 and range "from 24 to 38 lbs., averaging 30 lbs." in weight, was tendered to Ak-Sar-Ben Fruit Co. and after rejection was resold by Bokenfohr at a loss of \$121.83. Bokenfohr asked for damages to cover his loss.

Rulings included in Decision

1. Ragan Brokerage Co. earned \$15 brokerage on each of eight carloads of watermelons sold for Bokenfohr. Since the claim was filed for only \$105, the brokerage on 7 carloads, the complainant was awarded that amount plus interest against Jac Bokenfohr.

2. Jac Bokenfohr tendered to Ak-Sar-Ben Fruit Co. a shipment of watermelons which met contract requirements and the rejection was without reasonable cause. He was therefore awarded \$121.83, plus interest, against Ak-Sar-Ben Fruit Co. Bokenfohr failed to submit proof of additional loss from expenses incurred in sending telegrams.

3. The contention of Jac Bokenfohr that Ragan made certain misrepresentations in connection with the shipment involved in Docket 3244 was not sufficiently supported by proof to warrant consideration. The complaint against the Ragan Brokerage Co., was therefore dismissed.

S-2356, May 22, 1940, Docket 3282: (S. P.)

H. ROTHSTEIN & SONS, INC., PHILADELPHIA, PA. v. ASSOCIATED SALES CO.,
PAYETTE, IDAHO, AND/OR J. C. SEWELL PRODUCE CO., INC., NAMPA, IDAHO

Violation charged: Failure to deliver
in accordance with contract carload
of prunes.

N-4

Principal point involved: Burden of proof
on complainant to show extent of loss
caused by either respondent or that
prunes were not in suitable shipping
condition.

Order: Complaint dismissed.

Outline of Facts

On or about August 1, 1938, complainant purchased from Associated Sales Co. 10 carloads of U. S. No. 1 Italian prunes at the f.o.b. price of 60¢ per half-bushel basket, complainant to pay a brokerage fee of \$25 per car and make an advance of \$500 to cover a cash deposit of \$50 per car. This complaint covers only one carload, 1139 half-bushel baskets, billed to complainant at \$683.40, plus a brokerage of \$25, less a \$50 deposit previously made by complainant, or \$658.40, for which amount a draft was drawn on complainant. The car was shipped from Homeland, Idaho, where Federal inspection showed the prunes graded U. S. No. 1. Although apparently not examined or inspected by complainant at Philadelphia, Pa., the shipment was diverted by complainant to a purchaser at Newark, N. J., where Federal inspection on September 12 covering "accessible portion of load consisting of two upper layers" showed "stock now fails to grade U. S. No. 1 only account decay" which was certified to be "from 1 to 35%, most baskets showing from 5 to 15%. Decay is mostly Rhizopus soft rot, some Blue Mold rot; various stages." Because of this condition, it was rejected by the Newark purchaser, who had made the purchase acceptance track Philadelphia final, at the f.o.b. Philadelphia price of \$1 per basket, or \$1139 for the carload, less freight of \$601.80, resulting in a net sum of \$537.20. The following day it was diverted by complainant to New York City, where it was resold at

auction for the net sum to complainant of \$267.16 and complainant billed the Associated Sales Co. for a loss of \$278.04, alleged to be the difference between the price at which sold to the Newark purchaser and the amount realized by complainant on resale after rejection. Complainant, however, was in error concerning this difference, which was shown by the record to be \$270.04, the identical sum for the recovery of which complainant filed a freight claim with the carrier, which claim was subsequently settled for \$100, without any showing whatever of how such settlement was reached.

Ruling included in Decision

The record showed that complainant sustained a loss of \$170.04, but this alone was not a sufficient showing of right to recover from either of the respondents. The contract specified U. S. No. 1 Italian prunes and Federal-State inspection showed that the Associated Sales Co. delivered a carload of prunes to the carrier which graded U. S. No. 1 on the day of shipment from Idaho. Therefore the Associated Sales Co. was in no way responsible for complainant's loss, unless the prunes were not in suitable shipping condition at the time of delivery to the carrier. Complainant failed to submit any proof whatever which showed conclusively that this was so. Quite to the contrary, the recovery from the carrier raised a strong presumption that a considerable portion, if not all, of complainant's loss was due to damage in transit. The burden of showing the extent of loss caused by either respondent as distinguished from that inflicted by the carrier rested entirely upon the complainant, which failed to submit any proof in this respect. Moreover, J. C. Sewell Produce Co. Inc. was joined as a respondent without any showing in either pleadings or proof that there was any reason to include that firm. The complaint was therefore dismissed as to both respondents.

S-2357, May 22, 1940, Docket 3370: (S. P.)

J. E. NELSON, ALTOONA, PA. v. D. O. WILLIAMS & CO. INC., ST. LOUIS, MO. AND CICARDI BROS. FRUIT & PRODUCE CO., ST. LOUIS, MO.

Violation charged: Unjustified rejection of a carload of apples by Cicardi Bros. Fruit & Produce Co., or false and misleading statements for a fraudulent purpose by D. O. Williams & Co.

Principal points involved: When buyer adds specification seller is under obligation to refuse to agree unless willing to accept risk of goods meeting specification; seller's failure to reject specification resulted in its acceptance.

Order: Complaint dismissed.

F-2

F-33

Outline of Facts

On October 14, 1938, complainant wired the broker, D. O. Williams & Co. Inc., HAVE CAR USONE GRIMES TUQUARTER TUHALF OFFER EIGHTY CENTS FOB ADVISE QUICK POSTAL. The broker replied CICARDI OFFERS DOLLAR DELIVERED $2\frac{1}{4}$ GRIMES IF HEAVY $2\frac{1}{2}$ CLEAN ANSWER QUICK POSTAL, to which complainant answered ANSWERING THIS NICE CAR GRIMES BESCANDO .80 FOB ANSWER QUICK POSTAL. The broker's answering wire read ANSWERING OKAY CICARDI .80 FOB CAR USONE GRIMES PER EXCHANGE WIRES VENTILATED IMMEDIATE SHIPMENT ANSWER POSTAL TELEGRAPH, to which the complainant replied CONFIRM CICARDI TUQUARTER TUHALF GRIMES SHIPMENT TOMORROW .80 FOB. Complainant thereafter shipped a carload of 528 bushels of Grimes Golden apples from loading point in Pennsylvania to St. Louis, Mo., where it was rejected by Cicardi Bros. Fruit & Produce Co. because the apples were not "heavy $2\frac{1}{2}$, clean." The fruit was resold at St. Louis at a loss to complainant of \$140.99, for the recovery of which this complaint was filed.

Federal inspection at destination disclosed the apples were grade U. S. No. 1, $2\frac{1}{4}$ inch minimum, and, with reference to size, were certified as "Generally ranging from $2\frac{1}{4}$ to $2\frac{1}{2}$ ", less than 5 percent under $2\frac{1}{4}$ ", 10 percent by weight $2\frac{1}{2}$ " and larger."

Rulings included in Decision

1. Cicardi Bros. Fruit & Produce Co. contracted to purchase a carload of U. S. No. 1 grade Grimes Golden apples, $2\frac{1}{4}$ to $2\frac{1}{2}$ inch, heavy $2\frac{1}{2}$ inch, clean, at 80¢ per bushel f.o.b. The telegrams showed conclusively that Cicardi did not accept complainant's first offer, but made a counteroffer to purchase apples at a somewhat lower price on condition they were "heavy $2\frac{1}{2}$, clean." Complainant replied stating no reduction would be made in price, but avoiding any reference to the added specifications of size and cleanliness which were injected into the respondent's counteroffer. Respondents finally agreed to the price asked by complainant "per exchange wires," which clearly included "heavy $2\frac{1}{2}$, clean." Complainant replied confirming "tuquarter tuhalf" without any reference to "heavy $2\frac{1}{2}$, clean", which required as careful consideration as the price. The failure of complainant definitely to reject the specification "heavy $2\frac{1}{2}$, clean" resulted in an acceptance of it by him. Complainant was under an obligation so to inform the respondents and definitely refuse to agree to the specification "heavy $2\frac{1}{2}$, clean" unless he was willing to assume the risk that the apples would meet those specifications.

2. Complainant failed to show that he tendered apples which met the requirements of the contract and failed to show that any false or misleading statement was made by the broker. The complaint was therefore dismissed.

S-2363, May 22, 1940, Docket 3259: (S. P.)

GEORGE S. LUTZ & CO., PHILADELPHIA, PA. v. DeMARCO CO. INC.,
BALTIMORE, MD.

Violation charged: Making of false and misleading statements in purchasing 262 packages of green beans for complainants.

D-9 Principal points involved: In absence of proof that beans were to be of particular grade or quality parties held to have contracted for merchantable beans.

Order: Complaint dismissed; respondent awarded \$13.10, plus interest.

Outline of Facts

On or about April 20, 1938, by telephone, complainants employed respondent as their broker to purchase a truckload of beans at Baltimore, Md., for transportation to Philadelphia, Pa., but the record contained no proof of the instructions given by complainants. Later the same day respondent wired complainants: "FORWARDING YOU TRUCK CONTAINING 262 BASKETS BRITTS BEST BOUNTIFUL BEANS COST 1.10 BALTIMORE." After receiving the shipment complainants notified respondent the beans were not of the quality represented, sold them at prices somewhat below market quotations for best quality beans, and brought this proceeding to recover the difference between prices received and the prevailing market price at Philadelphia for beans of the quality claimed to have been purchased.

Respondent denied all liability, contending that Britts Best is a trade name and does not signify any particular quality or grade, and filed a counterclaim for brokerage fees totaling \$28.10, which was computed at the rate of 5¢ per package on these 262 packages of beans and on 300 packages of peas concerning which no proof whatever was offered of services rendered.

Rulings included in Decision

1. The record failed to contain any proof whatever to show that the complainants understood that they were to receive any particular grade or quality of beans. Under these conditions, the parties must be held to have contracted for the purchase and sale of merchantable beans. The record disclosed that complainants received beans which were sold by them at prices somewhat below prevailing market quotations at the Philadelphia market for best quality beans, but they failed to prove that they contracted to purchase beans of a quality and grade superior to the beans received by them which, by their own statements, were shown to have been sold at fair prices. Under these conditions, complainants had no cause of action against the respondent and the complaint was therefore dismissed.

2. Respondent was entitled to a fair and reasonable fee of 5¢ per package, or \$13.10 for its services in purchasing the beans for complainants, but did not show that it was entitled to recover any other or additional brokerage fee. Respondent was awarded \$13.10, plus interest.

S-2368, May 22, 1940, Docket 3245: (S. P.)

NORTHERN FRUIT CO., INC., WENATCHEE, WASHINGTON v. W. F. HELM
PRODUCE CO., KANSAS CITY, MISSOURI

P-2 Violation charged: Unjustified rejection
 of a carload of apricots.
 Principal point involved: "Sound arrival"
 deemed to mean goods are to arrive showing
 very little deterioration and not met by
 apricots showing 5% soft and 2% decay and
 plums showing 8% soft and no decay.
 Order: Complaint dismissed.

Outline of Facts

On or about July 22, 1938, through a broker, complainant sold to respondents, on an f.o.b. basis, 1259 lugs of Washington No. 1 apricots at 40¢ per lug and 88 crates of plums at 75¢ per lug, which had been shipped from loading point in Washington on July 20, with the added specification of "sound arrival." The shipment apparently arrived at Kansas City on July 27, and it was rejected by respondents. Resale was made at delivered prices of 45¢ per lug for the apricots and 75¢ per crate for the plums, or at a loss to complainant of \$426.72, for which an award was sought.

Certificates of Federal inspection at Kansas City on July 28 certified the shipment as failing to grade U. S. No. 1, stating:

Apricots Condition: "Stock mostly ripe with ground color turning or full yellow. In few boxes no soft stock but in most boxes from 2 to 16%, average, 5% soft. In about 1/2 of boxes no decay but in remainder boxes 2 to 8%, average 2%. Decay is Rhizopus Rot mostly in early stages." Grade: "Stock now fails to Grade U. S. No. 1 only account of decay."

Plums Condition: "Stock is generally ripe with 8% soft. No decay apparent." Grade: "Stock now fails to Grade U. S. No. 1 only account of soft stock."

Ruling included in Decision

The U. S. Standards for apricots provide a tolerance of 1% for decay and 10% for soft stock. For plums, the tolerance provided in the U. S. Standards for soft stock is 5% when scored as serious damage. In the absence of a trade custom as to what constitutes "sound arrival" of a given commodity, the term must be deemed to mean that the goods are to arrive showing very little if any deterioration. Consequently, it may even be presumed that the parties had in mind something better than U. S. No. 1 quality. Apricots and plums showing soft and decayed fruit in the amounts evidenced by the Federal certificates issued at Kansas City cannot be considered as complying with a contract calling for "sound arrival." It followed that the rejection of the shipment by the respondents was not without reasonable cause, and the complaint was therefore dismissed.

S-2369, May 22, 1940, Docket 3218: (S. P.)

GALANIDIS, FORCHAS & DOUROS, INC., NORFOLK, VA. v. V. HINES & CO., SALT LAKE CITY, UTAH

Violation charged: Failure to deliver a carload of onions in accordance with contract.
Principal point involved: No implied warranty that perishable produce will remain sound for any definite period of time after delivery.
Order: Complaint dismissed.

D-21

Outline of Facts

On or about February 18, 1939, through a broker, complainant purchased from respondents a carload of 600 50-lb. bags of U. S. No. 1, 3" and up, Utah Sweet Spanish onions, then at St. Louis, Mo., at the agreed price of \$1.80 per bag, or for \$1080, delivered Norfolk, Va. The shipment was diverted to complainant at Norfolk, where it arrived on February 21 and was accepted by complainant, which paid the agreed purchase price. Subsequently, however, on the removal of some packages from the car, some damaged onions were discovered and complainant requested an allowance, which was refused by respondents. Complainant thereafter stored the onions and reconditioned as many of them as necessary whenever they were sold, over a period extending from February 23 to April 14, during which time \$996.30 was received from sales, a loss of 52-1/2 bags being sustained. Testimony was introduced by complainant in an effort to show that if the shipment had been up to contract requirements it could have been sold for \$1350, and an award for the difference between that amount and \$996.30, or \$353.70, was sought.

Certificate of Federal-State inspection at Ogden, Utah, on February 11, showed the onions then graded U. S. No. 1, 3-inch minimum. Complainant believed that the injury in the onions resulted from freezing, and certificate of Federal inspection, for condition only, on February 24, stated: "Stock generally fairly firm to mostly firm. An average of 5% of stock, ranging in different sacks from 2 to 10%, shows from 1 to 3 outer fleshy scales or several inner scales of a glassy, water-soaked appearance characteristic of freezing injury, the affected stock being distributed in sacks in various locations in load. No decay."

Ruling included in Decision

Complainant failed to show that respondents failed to deliver onions which met contract requirements. The certificate of Federal inspection made at respondents' request showed no decay and stated that only 5% of the onions were damaged in a manner characteristic of injury from freezing. This was not proof that the stock failed to grade U. S. No. 1 on arrival at destination, since a tolerance of 5% is allowed for injuries of the type described in the certificate. The defects reported as characteristic of freezing injury were not of such nature as would progress or spread under normal storage conditions. The onions were not reconditioned within a reasonable time and the record failed to contain any showing whatever that the contract provided for the purchase and sale of onions suitable for storage purposes. There is no implied warranty that perishable produce will remain sound for any definite period of time after delivery. The complaint was dismissed.

S-2377, May 22, 1940, Docket 3224: (S. P.)

CITY PRODUCE & COMMISSION CO., LORAIN, OHIO v. W. H. MARTIN
BANGOR, MAINE

Violation charged: Failure to deliver a carload of potatoes in compliance with contract specifications.

Principal points involved: Seller required to refund excess paid as freight charges; other claims denied through failure to furnish adequate proof of loss.

Order: Complainant awarded \$12.06, plus interest.

Outline of Facts

On or about September 25, 1937, through a broker, complainant purchased from respondent one carload of U. S. No. 1 Green Mountain potatoes at \$1.15 per cwt. delivered at Lorain, Ohio. Respondent shipped from Fort Kent, Maine, a carload of 400 100-lb. sacks, shown by Federal-State of Maine inspection to have graded U. S. No. 1,

size A, on the morning of September 25, and billed complainant for the purchase price of \$460 less \$266.30 freight and refrigeration charges, or \$193.70, which was paid by complainant. The receipted freight bill, however, showed that complainant paid the carrier \$278.36, or \$12.06 more than respondent allowed in computing the charges at the time of billing. Complainant contended that the potatoes showed excessive decay and 362 sacks were reconditioned at a total loss of \$141.16, which included the \$12.06 difference in freight, a loss of 24 bags at the invoice price of \$27.60, the cost of 305 new bags amounting to \$30.50, and the cost of \$41 for 82 hours of labor, the total of which actually amounted to \$111.16.

Respondent testified that he had reimbursed complainant in the sum of \$12.06, but offered no evidence of payment, and later stated that he could not find the canceled check evidencing such payment.

Federal inspection certificate issued October 4, stated: "generally firm. Average 2% Late Blight Tuber Rot, initial stage. Most sacks from 1% in some to 8% in others, some sacks none, averaging 3% well advanced Slimy Soft Rot, in some instances decay follows Late Blight."

Rulings included in Decision

1. Complainant failed to furnish adequate proof that the losses alleged to have been incurred in reconditioning this shipment were actually sustained by it. Complainant's witness testified that the potatoes were reconditioned with the loss described above and he identified a scrap of paper which he said had been kept in the warehouse, and which apparently was intended to show the number of sacks reconditioned and the number of sacks lost, with the hours of time used in the process. No evidence whatever was presented by the complainant to show when these potatoes were reconditioned and the claimed loss of 24 sacks was twice the amount of Soft Rot indicated by the Government inspection, which was not made until four days after the shipment arrived at destination. The record contained no evidence, other than this witness's testimony, that 305 new bags were used, that the bags were purchased at the cost claimed, or that it was necessary to use new bags.

2. Respondent's failure to refund to complainant the excess of \$12.06 paid as freight was in violation of section 2 of the act. Complainant was awarded \$12.06, plus interest.

S-2379, May 22, 1940, Docket 3325: (S. P.)

FRANKENTHAL CO., SANGER, CALIF., v. McDONNELL & BLANKFARD CO.,
BALTIMORE, MD.

Violation charged: Unjustified rejection
of a carload of onions.

Principal point involved: Failure to
notify respondents of rejection within
time provided in regulations amounted to
rejection without reasonable cause.

Order: Complainant awarded \$300, plus interest;
publication of facts.

Appeal: On verdict of jury in U. S. District
Court in favor of respondents, Secretary's
decision not sustained.

Outline of Facts

On or about May 16, 1938, through a broker, complainant sold to respondents one carload of 600 sacks of 80% U. S. No. 1 grade onions, at \$1.45 per sack delivered Baltimore, Md. Six hundred sacks of onions, certified by Federal-State inspector as grading "U. S. Commercial with approximately 80% U. S. No. 1 quality" at the time of shipment from Poth, Texas, on May 14, were transferred at Galveston, Texas to the Morgan Steamship Lines, which delivered them at Baltimore, where they were rejected by respondents. Transportation charges from shipping point in Texas to Baltimore amounted to \$285.34, which, deducted from the gross price of \$870, left the contract price \$584.66. After rejection, the shipment was resold for the net sum of \$284.66, or at a loss to complainant of \$300, for the recovery of which complainant sought an award.

The testimony showed that the steamship arrived at Baltimore on Sunday, May 22, and respondents were notified by telephone and letter during the day of May 23 that the onions were unloaded and available for delivery. During the afternoon of May 24, respondents requested Federal inspection and the Federal inspector told them that incomplete examination, which had been made for the steamship company, disclosed 3% decay. During the afternoon of the same day, after his inspection was complete, the Federal inspector confirmed this report of 3% decay.

Ruling included in Decision

Respondents failed to show by competent evidence that they rejected the onions prior to the morning of May 25, which was considerably more than 24 hours after they were notified of the arrival of the shipment and, therefore, not within a reasonable time, as construed in the regulations promulgated under the act. Although respondents applied for Federal inspection on May 24, within 24 hours after the onions were unloaded and accessible for inspection, and a report had been received of the inspector's findings some time in

the afternoon, no action was taken within an hour to notify the seller or the broker of the rejection. Such failure to notify the complainant or the broker within the time provided in the regulations promulgated under the act with respect to their intention to refuse to accept the onions amounted to a rejection without reasonable cause. Complainant was awarded \$300, plus interest.

Appeal

Appeal was filed by respondents to U. S. District Court in June, 1940; case was tried before a jury October 23, 1940; jury brought in verdict for respondents on instructions of court that jury not bound by regulation but could arrive at own conclusion as to what was a reasonable time for rejection.

S-2381, May 22, 1940, Docket 3435: (S. P.)

C. C. WINKLER CO., VINCENNES, INDIANA v. PHILLIPS FRUIT CO., MINNEAPOLIS, MINN.

Violation charged: Unjustified rejection of a carload of watermelons.

Principal point involved: Proof of agency conflicting and no note or memorandum signed by buyer or alleged agent, making contract, if one entered into, unenforceable.

Order: Complaint dismissed.

Outline of Facts

Complainant claimed that on or about August 9, 1939, through his broker, he sold to A. Marcus, as agent for respondents, after inspection, a carload of watermelons then on track at Minneapolis, at \$200 f.o.b. Minneapolis, but that two days thereafter Marcus informed complainant's broker, J. P. Michels, that Phillips Fruit Co. would not accept the melons. On resale of the rejected shipment to another purchaser, a loss was sustained in the amount of \$83.80, which complainant sought to recover.

Complainant's proof of agency consisted of the sworn statement of Michels that "at various times during July and August 1939," he sold carlots of melons to "the respondents, inspection and purchases being made by Marcus; that in each instance the invoices for the commodities purchased were delivered to the Phillips Fruit Company" and that "remittances were received by" Michels "from the Phillips Fruit Company in payment of the invoices so rendered." On the other hand, the respondents stated that Marcus was not their agent, did not represent them as agent, and was not connected with the respondents in any capacity.

Ruling included in Decision

Not only was the proof of agency sharply conflicting, but there was no note or memorandum signed by the respondents, or either of them, or their alleged agent. There was no acceptance of the melons and the contract, at most, was a contract to purchase. The contract, if one was in fact entered into by Marcus, as agent, could not be enforced because of failure to comply with the requirements of the statute of frauds. The complaint was therefore dismissed.

S-2385, May 22, 1940, Docket 3414: (S. P.)

PHILLIPS & CO., INC., NORFOLK, VA. v. S. & S. PRODUCE CO.,
JOHNSTOWN, PA., AND J. E. NELSON, ALTOONA, PA.

Violation charged: Unjustified rejection
of a carload of potatoes; false and mis-
leading statements.

Principal point involved: Complainant failed
to tender shipment of potatoes which met
contract requirements.

Order: Complaint dismissed.

Outline of Facts

Complainant and the broker, J. E. Nelson, contended that on July 6, 1939, complainant sold to respondent a carload of 300 bags of U. S. No. 1 Cobbler potatoes at \$2.35 per 100 lb. bag delivered, or for the sum of \$705, less freight, as evidenced by broker's standard confirmation of sale, one copy of which was submitted to this office by the broker and another by the complainant. The broker claimed that a third copy was mailed to S. & S. Produce Co. on the morning of July 7. On July 6, complainant shipped the potatoes from Toano, Va., and on the same day diverted them to Johnstown, Pa., where the car arrived promptly, but S. & S. Produce Co. claimed the stock was damaged and refused to accept delivery unless complainant would grant an allowance of twenty cents per sack. Complainant refused to grant any allowance until proper proof was submitted to show the damage. No attempt was made by the S. & S. Produce Co. to support the claim that the potatoes were damaged, but instead S. & S. Produce Co. arbitrarily refused to accept the shipment. Resale was made at \$1.70 per bag delivered, or for the net sum of \$403.95 after allowance of \$106.05 for freight charges, which was \$195 less than the price for which sale had been made to S. & S. Produce Co. In addition to this sum complainant asked to be reimbursed for \$15 telegraphic and telephonic expense in connection with the rejection and resale and \$4.40 demurrage, but failed to present any proof in support thereof, so these items could not be included in the claim for damages.

Federal-State inspection at Toano, Va., on July 6, showed "Grade defects range from 5 to 15% averaging approximately 10% chiefly pitted scab. Less than 1/2 of 1% soft rot" and the stock failed to grade U. S. No. 1, approximately 90% being of U. S. No. 1 quality.

Rulings included in Decision

1. An enforceable contract for the purchase and sale of the potatoes was entered into by the parties. S. & S. Produce Co. did not deny receiving a copy of the confirmation of sale, which was presumed to have been received promptly, and the record failed to show that any objection was made to the sale as specified therein until an answer to the complaint was filed denying that the potatoes were purchased.

2. The facts as presented in the record failed to disclose any liability on the part of J. E. Nelson.

3. Complainant failed to tender a shipment of potatoes which met contract requirements because of permanent grade factors. The complaint was therefore dismissed.

S-2386, May 22, 1940, Docket 3300: (S. P.)

JOSEPH ROTHENBERG, BUFFALO, N. Y. v. JOHN B. SENTER, INC., NORFOLK, VA.

Violation charged: Failure to pay a deficit incurred in selling on consignment a carload of spinach.

Principal point involved: In failing to show he performed his duties in attempting to sell respondent's rejected spinach, he failed to prove his right to recover alleged deficit.

Order: Complaint dismissed.

Outline of Facts

On or about November 16, 1938, respondent shipped a carload of 715 bushels of spinach from Lake Smith, Va., consigned to the Atlantic Commission Co., Detroit, Mich., but before it arrived at that point it was diverted by the Atlantic Commission Co. to Buffalo, N. Y., for delivery to Ward H. Kendrick. Kendrick promptly rejected the shipment and immediately thereafter respondent instructed the Atlantic Commission Co. of Buffalo to get some reliable dealer to sell it for respondent's account without further delay. In compliance with these instructions, the shipment was delivered to complainant after the close of the market on November 21. Complainant, without any notice whatever to respondent, allowed the shipment

to stand in the car until sometime November 25 before attempting to sell any part of it. A period of approximately two weeks was consumed in the sale of the spinach, at the close of which time a little more than 70% of it was condemned and dumped by the Buffalo City Health Department, and complainant rendered accounting showing a deficit of \$162.27, for the recovery of which this complaint was filed.

Ruling included in Decision

In failing to show that any effort was made to sell the spinach until some three or four days after he agreed to handle it, complainant failed to make a prima facie showing that he performed his duties in accordance with contract requirements and for this reason he failed to prove his right to recover. Complainant contended that the delay in starting to sell was due to a glutted market, but he did not so advise respondent, who was asked to pay \$52.80 demurrage as part of the alleged damage. The spinach was apparently in poor condition when it arrived at Buffalo, but complainant either knew this or owed a duty to respondent to examine the shipment promptly and acquaint himself with the requirements for disposition. If it required prompt handling, as it evidently did, it was complainant's duty to act promptly in making disposition or advise the respondent that the condition of the market would not permit such action. Complainant introduced evidence to show that two weeks was not an unreasonable length of time within which to dispose of spinach in the condition of that here under consideration. This might be accepted as true and yet not answer the question of why no sales were made until approximately three days after complainant agreed to handle the spinach. It was possible that it could have been sold for a sum sufficient to pay all costs if it had been offered promptly. At least the demurrage charges of \$52.80, in all probability, would have been substantially reduced or eliminated. Complainant submitted testimony to show that Virginia spinach was selling at Buffalo "during the week of November 21, 1938", at prices ranging from 50 to 75¢ per bushel, "poor lower." It appeared, therefore, that there was a market at Buffalo during the time the spinach was held by complainant before the car was opened. The complaint was therefore dismissed.

S-2389, May 22, 1940, Docket 3301: (S. P.)

METZGERS, INC., GREENVILLE, MICH., v. SITKIN BROS. FRUIT & PRODUCE,
NEW YORK, N. Y.

Violation charged: Unjustified rejection
of a carload of onions.

Principal point involved: Buyer justified
in refusing to accept semi-globe type
onions tendered under contract calling
for Yellow Globe onions.

Order: Complaint dismissed

Outline of Facts

On or about October 19, 1938, complainant sold to respondents a carload of U. S. No. 1 Yellow Globe onions, warranted as 75 to 85% 2" in diameter, to be delivered in 50-pound bags, at \$1.04 per sack delivered. Shipment of 500 sacks was made from Ionia, Mich., on October 22. Upon arrival at New York City, respondents refused to accept the onions at the agreed purchase price, assigning as a reason that they were not globe type, but semi-flat or semi-globe type. Respondent claimed that flat or semi-flat type of yellow onions do not sell on the New York City market as well as yellow globe type onions, and offered to accept at a reduction in price, or, as an alternative, to accept a replacement shipment. Complainant declined to forward another car or make a reduction in price and thereafter resold the shipment for net returns of \$314.11, claiming damages of \$78.39.

The Federal inspector at shipping point described the onions as "Yellow onions in new 50-lb. papernet sacks stenciled 'Good Luck' brand," and certified that they graded U. S. No. 1. However, he stated that the onions were "semi-globe type," and at the time he issued his original certificate he did not indicate thereon the shape because that information was then not required to be placed on certificates.

Ruling included in Decision

Complainant failed to furnish onions that were of globe type and respondents were justified in refusing to accept the shipment at contract price. The complaint was therefore dismissed.

S-2390, May 22, 1940, Docket 3209: (S. P.)

MAX HARWITZ & CO., MILWAUKEE, WIS. v. EDWARD E. SMOCK,
INDIANAPOLIS, IND.

Violation charged: Unjustified rejection
of a carload of onions.

Principal point involved: Burden of proof
on complainant to establish specifications
of contract.

Order: Complaint dismissed

Outline of Facts

On October 15, 1938, complainant sold to respondent a carload of Idaho Sweet Spanish onions then on track at Chicago, Ill., at 35¢ per 50-lb. bag. Complainant contended that the sale was made after respondent's inspection, at a price f.o.b. Chicago, and that there was no warranty or representation as to the condition of the onions, particularly as to the extent that they were affected by decay, and because the onions were rejected by respondent, complainant asked for an award of \$181.88 to cover damages sustained.

Respondent contended that the onions were purchased at Chicago, Ill., at 35¢ per bag "f.o.b. Indianapolis, with allowance of 5% decay *** and therefore no inspection was made at Chicago, or before (the onions) arrived in Indianapolis on October 17, 1938." Both parties presented witnesses to support their statements.

Arrival notice issued by the railroad showed the car was way-billed from Milwaukee, Wis., Oct. 12 and arrived at Chicago, Oct. 13. Federal inspection at Indianapolis on Oct. 18 showed decay ranging from 40 to 75% "averaging approximately 50% for the lot as a whole ***."

Ruling included in Decision

The oral evidence was sharply conflicting and there was no evidence of a physical nature to support or corroborate the contentions of either party to the dispute. The complainant had the burden of proof and, since he failed to present convincing evidence sufficient to meet that burden, the complaint was dismissed.

S-2391, May 22, 1940, Docket 3431: (S. P.)

TROMBETTA'S INC., SOUTH MIAMI, FLORIDA v. SPINALE BROTHERS,
BOSTON, MASS.

Violation charged: Unjustified rejection
of a carload of tomatoes.

Principal point involved: To prove that
rejection was not justified. Complainant
must show that tomatoes complied with
specifications of contract.

Order: Complaint dismissed.

Outline of Facts

On March 7, 1939, respondents made a contract with complainant, by telephone, involving two carloads of tomatoes to be shipped from Dania, Florida, to respondents at Boston, Massachusetts. The second carload was sent, accepted and paid for, and no complaint was made as to it. Complainant bought the first carload for \$995.60 and paid for it, but when it arrived in Boston it was rejected by the respondents, who claimed they had purchased U. S. No. 1 tomatoes, and they submitted a certificate of Federal inspection made at Boston, Mass., on March 13, showing that the tomatoes failed to grade U. S. No. 1 "account defects in excess of tolerance." Complainant claimed that the contract entered into made it the agent of respondents to purchase tomatoes which were to be of 6x7 and 7x7 sizes, with no reference to grade, it being agreed that Edge brand or Frostie brand would be satisfactory. After rejection the shipment was resold by complainant at a loss of \$363.40, to which, in claiming damages, was added expense of \$11.58 in sending telegrams.

Ruling included in Decision

If the tomatoes sent were not such as the contract called for, there was reasonable cause for rejection of them by the respondents. In order to prevail, then, complainant would have to show that the tomatoes did comply with the specifications in the contract. The evidence as to what those specifications were was in direct conflict, and it was not established that the contract called for such tomatoes as were sent. The complaint was therefore dismissed.

S-2422, June 21, 1940, Docket 3492: (S. P.)

HAZLEHURST MERCANTILE CO., INC., HAZLEHURST, MISS. v. ZEIDENSTEIN BROS., PITTSBURGH, PA.

Violation charged: Unjustified rejection of a carload of cabbage.

J-14 Principal point involved: Administrative tribunals are not bound to strict rules of procedure followed by courts.

Order: Complaint dismissed.

Outline of Facts

On May 8, 1939, through a broker, complainant sold to respondents one carload of "U. S. No. 1, Medium, Round Type Cabbage - fresh green stock - heavy bulge pack - packed in pony crates @ \$1.30 crate delivered." On the same day complainant loaded 400 crates into a car at Hazlehurst, Miss. At the request of respondents, on May 9 the Federal-State Inspection Service at Crystal Springs, Miss., wired respondent the results of their inspection on May 8, including a statement that the cabbage graded U. S. No. 1 green and that it ranged from 1-1/4 to 4-1/2, mostly 2 to 3-1/2 pounds in weight, with three to seven, mostly three to five, wrapper leaves. The shipment arrived at Pittsburgh May 12 and respondents promptly rejected it, claiming it was not a car of U. S. No. 1 Medium, as specified in the contract. Resale was made at \$1.10 per crate f.o.b. Pittsburgh, Pa., and complainant claimed a loss of \$101.10, for the recovery of which this complaint was filed. Subsequently complainant adopted as its approximate loss the sum of \$81.10 as shown in the report of investigation made by the Department. Complainant claimed that from telephone conversations, and not then having a copy of the specifications, the request for green cabbage was understood to permit shipment of U. S. No. 1 green; that respondent knew on May 10 that the car was U. S. No. 1 green cabbage and if it had been rejected at two or three days out it would have been much easier to dispose of it and at less expense.

In support of complainant's position that rejection on the ground that the cabbage heads were not of proper size barred later objection that it was U. S. No. 1 Green, its attorney quoted from 55 C.J.309: "By Objecting on Other Grounds. It has been stated in many cases that a buyer who bases his refusal to accept the goods on specified grounds waives all other known grounds of objection which could have been urged, particularly where he acts deliberately after complete information." However, this quotation was followed by equally important and qualifying statements: "But it has been held that this rule does not apply, in the absence of an intentional waiver, where the buyer's silence as to other grounds of objection does not induce a seller in reliance thereon, to change his position to his detriment, and it will be found upon examination of the cases stating the rule in the broad terms set

out above that in some of them at least, this element of estoppel was involved. The rule has been wholly repudiated in some cases. And, in any event the buyer, by his silence, does not waive grounds of objection of which he has no knowledge, and which he is not bound to anticipate." He also cited Griffin Grocery Co. v. Richardson, 10 F. (2d) 467, in which it was held that a buyer could not object to the uneven quality of sorghum seed in bags after having rejected the shipment because of poor quality and made no objection to the bags containing varying amounts of seed, which, if objected to before, could have been remedied by the seller.

Rulings included in Decision

1. It was clearly shown, and admitted by the complainant, that the cabbage was not in strict accordance with the contract requirements. The only difference between U.S. No. 1 Green cabbage, such as shipped by complainant, and U.S. No. 1 cabbage, as specified in the contract, was that U.S. No. 1 cabbage must be well trimmed and U.S. No. 1 Green may be fairly well trimmed. "Well trimmed" means that not more than four wrapper leaves can be left on the head, while in the case of "fairly well trimmed" not to exceed seven wrapper leaves remain on a head. The term "medium" refers to the size of the head, which has nothing to do with the grade. In the case of domestic round type cabbage, the term "medium" means that the head must range from two to five pounds in weight, with a tolerance of 15% allowed, but this tolerance is restricted to a variation of not more than 10% either above or below the specified size.

2. It was clearly shown that respondents rejected the shipment promptly upon arrival, thereby placing complainant in a position to resell without unnecessary delay. In this case an earlier objection by respondents would not have permitted complainant to have complied with the contract requirements, because the cabbage had been in transit approximately two days before respondents knew that it did not meet contract requirements. The remaining cases cited by complainant's attorney in support of his contention that the respondents were restricted to the reasons stated at the time of rejection were concerned with formal court procedure. Administrative tribunals are not bound to strict rules of procedure followed by courts, and consideration, therefore, should be given in this proceeding to any defense which respondents may have had, regardless of when it was first asserted by them. The complaint was dismissed.

S-2429, June 22, 1940, Docket 3569: (S. P.)

MID-WESTERN BROKERAGE & DISTRIBUTING CO., ST LOUIS, MISSOURI v.
B. D. ANGLISH & CO., CHICAGO, ILLINOIS.

Violation charged: Failure to pay a broker-
age fee and expense incurred in handling
a carload of cabbage.

Principal points involved: General rule is
B-1 commission merchant has no implied
B-3 authority to reship consigned goods to
B-11 another market for sale; if he so exceeds
B-18 his authority he is liable to his prin-
E-4 cipal for actual loss; agent may exceed
G-4 his authority only under extreme circum-
stances; expenses incurred without authority
unallowable.

Order: Complaint dismissed; counter-
complaint dismissed.

Outline of Facts

The record indicated that on October 19, 1939, by telephone, respondent agreed to consign to complainant a carload of cabbage which complainant would sell intact for a brokerage fee of \$15. Thereafter shipment was made from Chicago, Ill., to St. Louis, Mo., and the car arrived at destination on Friday, October 20. On the next day and on Monday complainant wired respondent that prices were too low to make sale, and on October 24 that sale had been made at Kennett, Mo. In answer to respondent's objection to the manner in which the sale was made and request for the name of the buyer, complainant did not name the buyer but advised that the buyer had rejected on account of bad condition and that the shipment had been released to the buyer for reconditioning and disposal to best advantage. Several weeks later complainant advised that the cabbage had been sold at a net loss of \$50, but no evidence was submitted in support of such statement. Complainant asked for an award of \$154.32 to cover freight, demurrage, brokerage and telegraphic charges.

Respondent contended that complainant was authorized to sell the car at St. Louis but had no authority to consign it, that respondent was not advised of the deteriorating condition of the cabbage and should not be liable for expenses incurred by complainant in mishandling. A counterclaim was filed for \$164.69, alleged to be the purchase price of the cabbage, or respondent's loss resulting from the mishandling.

Rulings included in Decision

1. Complainant showed no authority, either express or implied, to reship the cabbage to Kennett, Mo. If, as the evidence indicated, complainant had prospective buyers in St. Louis and respondent shipped with the idea that sale would be effected there, clearly complainant had no authority to divert the car from St. Louis. Even though the evidence indicating an agreement to sell only in St. Louis was weak, there was a general rule that goods consigned to a commission merchant are to be sold in the market to which they were shipped and where the consignee, or factor, transacts his business, and that he has no implied authority to reship them to another market for sale there. Although complainant may have held itself out as a broker and distributor, and although its only recompense was to have been a brokerage fee of \$15, the record nevertheless showed that as agent of the respondent it (1) had possession of the goods and (2) either had or assumed the right to sell the goods in its own name, both of which are the distinguishing characteristics of a commission merchant or factor. Having assumed to act in such capacity, it must be held liable to the obligations of a commission merchant.

2. In regard to activities of a selling agent, a Departmental interpretation and construction of the Perishable Agricultural Commodities Act provides as follows: "If the agent feels it wise to forward the shipment to another market, the consent of the shipper should be obtained." Complainant showed no trade custom in and around St. Louis that deviates from the above-stated rule. Complainant asserted, but did not prove, that it had been customary for it, or its predecessor in business, to reship commodities of respondent to Kennett, or to points in that vicinity, and that complainant, or its predecessor, had previously, without objection, sold commodities to the buyer at Kennett. Respondent strongly denied the assertion and averred that it never heard of the buyer. Under extreme circumstances, where there is an emergency and it is impossible, or there is not sufficient time for the agent to consult his principal, he may, if necessary, exceed his authority and act to the best of his own judgment, so long as he does so in good faith. Even assuming that the cabbage was rapidly deteriorating and there was no desirable market for it in St. Louis, it did not appear that complainant's action came within the above-stated exception, which has been applied by the courts with great caution. There was ample time and opportunity for complainant to have consulted respondent. The record disclosed that there were several inspections made of the cabbage while at St. Louis. Complainant neglected to advise respondent of the increasingly bad condition, and a representative of complainant even stated on October 23 that it was a good car of cabbage. It was quite probable, especially in view of respondent's immediate protest, that had respondent been fully advised of the circumstances and been consulted in the matter, it would not have consented to divert the car to Kennett and incur additional freight charges. Since it was determined that the

expenses incurred by complainant resulted from an unjustifiable departure from its authority and were therefore not recoverable from its principal, the respondent, there was no necessity to decide the several other defensive questions raised by the respondent. The complaint was therefore dismissed.

3. Complainant's liability on respondent's counterclaim depended on the actual loss to respondent. The rule has been stated that if a selling agent reships goods, without authority or instructions from his principal, he is liable for the actual loss to the principal, that is, the difference between the market value at the place where the goods should have been sold, and the price for which they were sold. Without a clearer showing in the record, the price for which the cabbage was sold at Kennett, Mo., might be considered as nil, since the sale at Kennett was changed to a consignment and it appeared that no net proceeds resulted therefrom. After the dispute arose, respondent sent an invoice to complainant for \$164.49, which respondent claimed was the price it paid for the cabbage; but the respondent did not submit any evidence to prove the market value of the cabbage, in its condition, at St. Louis on or about the time when complainant should have sold it there. Inspection reports in the record indicated that the commodity was in an increasingly bad condition, not shown to be due to any neglect of duty by complainant, and it was a safe assumption, in the absence of any proof to the contrary, that if the cabbage was not of any commercial value on the date sold (later consigned) at Kennett, it was also of no commercial value on that date at St. Louis. Respondent did not prove that it lost anything by complainant's acting beyond its authority. The amount for which respondent claimed to have purchased the cabbage was unimportant, especially since it was not shown where or on what date purchase was made. Failing to prove any loss or damage, respondent was not entitled to recover its counterclaim and it was therefore dismissed.

S-2434, June 28, 1940, Docket 3372: (S. P.)

AMERICAN BANANA DISTRIBUTING CO., EL PASO, TEXAS v. GROVIER-STARR
PRODUCE CO., HUTCHINSON, KANSAS

Violation charged: Unjustified rejection
of a carload of bananas.

Principal points involved: Since complainant
failed to prove that it tendered delivery of
a carload of bananas which met contract re-
quirements, respondent's rejection was con-
sidered not without reasonable cause.

Order: Complaint dismissed.

Outline of Facts

On or about April 21, 1938, complainant shipped a carload of bananas from Galveston, Texas, to Fort Worth, Texas, and from there to Oklahoma City, Okla., where it arrived April 26, and the brokerage firm of C. H. Robinson Co. was requested to make an examination and secure a buyer. The next day complainant was advised that examination showed 25 to 50 bunches per car (this car being one of several shipped at the same time) were found to be ripe and turning. On April 28, a similar report was made to complainant that 75 to 100 bunches per car had been found to be ripe and turning. Apparently no commercial inspection service made inspection at shipping point, diversion point, or at destination. The Wichita, Kansas, branch of the brokerage company was contacted and on April 28 advised complainant that respondent offered \$1.25 per cwt. f.o.b. Galveston, Texas, which offer was accepted by complainant. The broker issued a standard memorandum of sale showing the shipment was sold as a rolling car, on track Oklahoma City, and the bananas were to be "first-class nines." The car moved from Oklahoma City to Hutchinson, Kansas, where respondent refused to accept, and the shipment was then resold by complainant at a loss of \$383.74, for the recovery of which this complaint was filed.

Respondent maintained that the purchase was made "providing the bananas were first class nines, fruit free from excessive scars and would arrive Hutchinson, Kansas, in a green condition" and the broker's wire of April 30 to complainant stated respondent estimated the carload showed "80% ripe 50% dead ripe of which 25% mashed 30% ripe and turning" and that all were badly scarred.

Complainant insisted the sale was made on the basis of the Oklahoma City inspection; this was denied by the brokerage company, which claimed the memorandum of sale correctly stated the terms of sale.

Ruling included in Decision

Since wires exchanged between complainant and the broker's Wichita, Kansas, office showed quite conclusively that the complainant insisted that the contract was made "on Oklahoma City inspection" while the broker contended that the car was not sold "on Oklahoma City inspection," there was considerable doubt whether there was a meeting of the minds of the contracting parties. If it were conceded, however, that a valid contract was entered into, complainant failed to sustain the burden of showing that it tendered a "roller" or "rolling car" or a carload of "first class nines," as definitely specified in the agreement, and respondent's rejection, therefore, was justified.

S-2453, July 23, 1940, Docket 3318: (S. P.)

J. D. KELLER, MAGNOLIA, DEL. v. S & S PRODUCE CO., JOHNSTOWN, PA.

Violation charged: Failure to pay the full contract purchase price of two truckload shipments of peaches and apples.

Principal point involved: No implied warranty that perishable produce will remain sound for any definite period of time.

Order: Complainant awarded \$151.20, plus interest; publication of facts.

Outline of Facts

On or about August 9 and 11, 1938, through a broker, complainant sold to respondents two truckloads of fruit. The first one consisted of U. S. No. 1 Elberta peaches at the delivered price of \$2 per bushel for 85 bushels of peaches, $2\frac{1}{4}$ inches and up, and \$1.50 per bushel for 140 bushels, 2 inches and up. Shipment was made by truck from loading point in Delaware to Johnstown, Pennsylvania, where respondents took delivery on August 10, after having had an opportunity for as full and complete inspection as they cared to make. The second lot consisted of peaches and apples at delivered prices of \$1 per basket for 167 baskets of peaches, "2- $2\frac{1}{4}$ inches," 90 cents per bushel for 30 bushels of Williams Red apples, " $2\frac{1}{4}$ inches," and 75 cents per bushel for 28 bushels of Williams Red apples "1- $\frac{3}{4}$ inches." So far as the contract showed, no quality, condition, or grade was specified for either the peaches or apples in this lot. Shipment was made from Delaware to Johnstown, where respondents took delivery on August 12. Complainant received \$453.80 of the total contract price of \$605, leaving an unpaid balance of \$151.20, for which an award was requested.

Respondents claimed some of the peaches were condemned by a local food inspector from the Health Department as unfit for human consumption; and that complaint was made immediately thereafter. The condemnation notice was dated August 12, and ordered disposition of 75 bushels condemned "as per J. D. Keller lot 35 bu. 2" to $2\frac{1}{4}$ " size 40 bu. $2\frac{1}{4}$ and up size."

A representative of the Department made an investigation of respondents' records, and found they failed to disclose what shipment the condemned peaches were from, when sales were first made, or when they were completed on either of the truckloads. They also failed to show what sum, or sums, were received by respondents on any of the sales, or who made the purchases.

Ruling included in Decision

There was no showing of the exact times when complaint was made to the complainant, or of the cause of decay, but it was clear that contrary to the respondents' statement in their answer, the peaches which were condemned came from the first truckload which was inspected and accepted by respondents two days before it was condemned. Jack Schmerin told the investigator they had no evidence showing the peaches did not meet contract requirements at the time of acceptance. Further, the receipt given by respondents for the peaches bore no notation that the fruit was not satisfactory. It is a well known fact that peaches are highly perishable and it has been repeatedly held in decisions under the act that a shipper cannot be bound by an implied warranty that any kind of perishable produce will remain sound for any definite period of time after acceptance of delivery. This is particularly true where the produce has been accepted after a full opportunity for inspection, as in the instant case. Under these conditions, the burden of proof rested on respondents to show whatever loss they may have sustained in the handling of the produce. Furthermore, it was incumbent upon them to show that such loss as they may have sustained was the direct result of some fault of complainant, or that the fruit was not as specified in the contract. The record failed to show that complainant contributed to the loss claimed to have been sustained by respondents and complainant was therefore awarded \$151.20, plus interest.

S-2457, July 27, 1940, Docket 3281: (Hearing)

Re: Application of Michael Dubin, Philadelphia, Pa., for a license under the Perishable Agricultural Commodities Act.

Principal point involved: While acting in capacity of president he was charged with duty of knowing the ability of the corporation to meet its obligations.

Order: Michael Dubin's application for a license denied.

Outline of Facts

A hearing was held to determine the truth of allegations contained in an order to show cause why Michael Dubin should not be denied a license, it being alleged that while he was an officer of J. H. Dubin & Co., Inc., Philadelphia, Pa., the corporation failed, neglected and refused, without reasonable cause, to account, either in full or promptly, to several jobbers and consignors of perishable agricultural commodities, and that the corporation had several outstanding obligations.

The applicant testified that he was Vice President of the corporation from the date it was licensed until it failed and that he acted in the capacity of salesman and buyer and was not aware of its financial condition until it had become practically insolvent, the finances being handled by the Secretary and Treasurer; that the President travelled practically all the time the corporation was licensed and performed most of the buying services, except for a period of seven months when he was away from the business; that when it failed the corporation owed H. W. Bird, Miami, Florida, \$2718.02 (the proceeds of sale of 6 carloads of tomatoes handled on joint account during May 1938), Altman & Swartz, Buffalo, N. Y., \$489.03 (the purchase price of one carload of California grapes), and Leonard (Casey) Jones, Los Angeles, California, \$5682.85 (the purchase price of 5 carloads of lettuce and 2 carloads of peas received in interstate commerce); and that the corporation did no business after it found it was unable to pay its obligations. (It ceased business in November, 1938.)

Ruling included in Decision

The applicant was responsible in whole or in part for the failure of J. H. Dubin & Co. to account to the shippers and was deemed unfit to receive a license under the act. He was connected with J. H. Dubin & Co. in the capacity of Vice President, and, during the absence of the president for seven months, it might be presumed that he acted in the capacity of president. On behalf of the corporation, the applicant entered into agreements with shippers and producers providing for the purchase and handling of perishable agricultural commodities. In entering into such agreements Dubin pledged the credit of the corporation and promised the shippers that payment would be made by it. While acting in the capacity of Vice President, or as President, he knew or was charged with the duty of knowing the ability of the corporation to meet the obligations which the corporation assumed. The several failures of the corporation to account to the shippers for 14 carloads of produce constituted repeated violations of the act, and its repeated failures to account to H. W. Bird constituted flagrant violations, since those transactions were on a joint account basis and the proceeds resulting from the sale of the products were trust funds, one-half of which belonged to Bird. A license was therefore denied to Michael Dubin.

S-2462, August 3, 1940, Docket 3475: (S. P.)

STANDLY HUXTABLE, MOOREHEAD, MINNESOTA v. R. A. KLOTZ & CO.,
CHICAGO, ILLINOIS

Violation charged: Failure truly and
and correctly to account for a carload
of potatoes.

Principal point involved: Complainant
not entitled to receive payment from
respondent and at same time disregard his
own obligations to respondent.

Order: Complaint dismissed.

Outline of Facts

Complainant alleged that, by written contract, on March 25, 1939, acting as agent for himself and respondent, he bought for respondent, to be sold for their joint account, 360 sacks of Ohio potatoes for \$378; that shipment was made from North Dakota to respondent at Chicago; and that respondent accepted the potatoes but refused to pay complainant therefor, leaving a balance due of \$383.

Respondent denied that complainant acted as his agent and claimed that the potatoes were forwarded to him for sale for complainant's account and that the proceeds of sale were credited to complainant's account as part payment of a debt of more than \$500.

Ruling included in Decision

From the pleadings and evidence submitted, the circumstances of purchase and handling of the potatoes involved could not be determined. If they were not purchased from complainant and he had not paid for them for the respondent, complainant, of course, was not entitled to payment for them; but if they were purchased from him, or he paid for them for respondent, he was still not entitled to receive payment and at the same time disregard his own obligations to the respondent. His insistence that his indebtedness to respondent was immaterial amounted to an admission that there was such an indebtedness. His contention that, instead of crediting his account, respondent should have paid him in cash for the potatoes, was unsupported. The complaint was therefore dismissed.

S-2474, August 26, 1940, Docket 3606: (Hearing)

CHARLES F. COWELL, WASHINGTON, N. C. v. S & S PRODUCE CO.,
JOHNSTOWN, PA.

Violation charged: Failure to pay the full amount of the purchase price for a carload of potatoes.

Principal point involved: Incorrect and false accounting was in flagrant violation of section 2 of act.

Order: Complainant awarded \$183.75, plus interest.

Outline of Facts

On June 15, 1939, through a broker, complainant sold to respondents a rolling carload of U. S. No. 1 Commercial potatoes at \$1.45 per cwt. delivered at Johnstown, Pa. A carload of 300 bags shipped on or about June 14 from Bayboro, N. C., was diverted, in transit, and upon arrival at destination respondents complained of the condition of the potatoes and complainant released the car with the understanding respondents would recondition the stock and charge "for labor and shrinkage." Respondents accepted the shipment under this agreement and thereafter rendered accounting which showed net returns of \$9.30, which were remitted. Subsequent investigations by investigators for the Department revealed that respondents did not recondition the potatoes, but sold the carload as received to local dealers, who found some decay and lost approximately 25 bags in reconditioning. As a result of these investigations, respondents paid complainant an additional \$62.50, and appeared to be entitled to a deduction of \$36.25, representing the price they agreed to pay complainant for the 25 bags lost in reconditioning. After deducting these credits respondents remained indebted to complainant in the sum of \$183.75.

Ruling included in Decision

Respondents, in flagrant violation of section 2 of the act, rendered complainant an incorrect and false accounting. Complainant was awarded \$183.75, plus interest.

S-2481, September 13, 1940, Docket 3577: (S. P.)

R. J. SHORTRIDGE, CITRA, FLORIDA, v. BRESLAUER & FLIEGLER,
NEW YORK, N. Y.

Violation charged: Failure to pay full amount of guarantee claimed to have been made on 192 hampers of beans.

Principal point involved: Weight given to failure to wire denial of guarantee not sufficient to establish guarantee by preponderance of evidence.

Order: Complaint dismissed.

Outline of Facts

On October 23, 1939, Sidney Newman, acting for and on behalf of respondents, entered into an agreement with complainant whereby the latter, upon receipt of \$100, was to deliver 192 hampers of wax beans to be transported to respondents to be sold on commission for complainant's account. The beans were shipped by truck from Florida to respondents at New York City and were there accepted. On the morning of October 26, respondents wired complainant: MARKET WAX 2250 HIGH AS 275 WAX ARRIVED VERY DRY TRUCK PULLED IN FRONT OF OUR DOOR FOUR AM THIS MORNING WAS HELD UP BY OTHER HOUSES UNTIL THIS TIME. ANSWER QUICK WHETHER I SHOULD PAY FULL FREIGHT. SOLD ONLY FEW FROM 2 TO 225. Complainant replied: YOUR REPRESENTATIVE GUARANTEED ONE NINETY OR BETTER - REFUSED TWO DOLLARS HERE ON THAT CONDITION - BEANS WENT ON TRUCK YOUR REPRESENTATIVE SELECTED AS I WANTED THEM REFRIGERATED. Respondents sold the beans at prices ranging from \$1 to \$2.25 per hamper, or for a total of \$261.75. From this amount they deducted \$100 to cover the amount advanced when the agreement was made, \$26.18 for commission, \$78.80 for cartage, and \$1.92 for loading, and sent complainant the balance of \$56.85. In support of his claim that an additional amount was due him because of a guarantee, complainant submitted an affidavit of one of respondents' employees and the employee's wife, which stated that they heard a verbal guarantee made to complainant and that the guarantee was \$1.90 per hamper.

Newman, representing respondents, by affidavit, denied that any guarantee was made. He stated that respondents' employee and his wife drove him to see complainant, that the employee might have overheard part of the conversation, but that his wife remained in the car and could not have heard any of it.

Ruling included in Decision

The record showed that on November 6 respondents' employee wrote Newman "Mr. Shortridge is quite sore about his sale on the beans and claims that you guaranteed him a \$2 net sale and that they averaged about \$1.25, we wired him that truck was late and

truckman claims that he left two or three baskets as samples and that he couldn't get to our store to unload, I spoke to Ira about the arrival and he stated that samples were left, however I think that he will cool off soon and we will again get his account." This was hardly the statement of an agent who had heard a guarantee of \$1.90. If the reference to \$2 was correct, it discredited the claim of \$1.90, and, if correct, it discredited the accuracy of the employee. When respondents received the complainant's telegram of October 26, claiming a guarantee, they might have wired him a denial of any guarantee, but any weight which might be given to their failure to do so was not sufficient to result in the establishment of a guarantee by a preponderance of the evidence. Complainant failed to meet the burden of establishing his claim by a preponderance of the evidence, and the complaint was therefore dismissed.

S-2502, October 7, 1940, Docket 3075: (Hearing)

T. V. WOOLAM, SAN BENITO, TEXAS v. BALDWIN-POPE MARKETING CO.,
ST. LOUIS, MO., AND/OR WILLIAM Y. BUCK, BROWNSVILLE, TEXAS

N-2	<u>Violation charged:</u> Unjustified rejection
	of two carloads of tomatoes.
N-4	<u>Principal points involved:</u> Prior transac-
N-12	tions provided proof of joint relation-
N-14	ship; burden on respondents to prove
H-34	contention as to time car to be diverted;
R-6	whether shipment made on date specified
	determined by preponderance of evidence;
	in absence of specific time for diversion,
	shipper had reasonable time to divert.
	<u>Order:</u> Complainant awarded \$1245.34, plus
	interest against both respondents; publica-
	tion of facts.

Outline of Facts

The contract in this case, entered into on May 28, 1937, called for six carloads of tomatoes at \$1.65 per lug, or \$1072.50 per carload, f.o.b. shipping point, sold by complainant to respondents. The contract with reference to three cars was mutually rescinded and one car was accepted and paid for. One car was rejected because of complainant's alleged failure to release it in time for it to be diverted to a customer to whom it had been sold by respondents and the other was rejected because of alleged failure of complainant to ship it on May 28. Complainant contended that diversion and shipment were made in accordance with instructions from respondent Buck and asked for an award of \$1245.34, the amount of damages alleged to have been suffered as the result of rejection by the two respondents of the two cars of tomatoes, shipped from San Benito, Texas, to St. Louis, Missouri.

Baldwin-Pope Marketing Co. contended it had no dealings with complainant and that its dealings were solely with William Y. Buck.

Rulings included in Decision

1. The evidence showed that William Y. Buck and Baldwin-Pope Marketing Co. were acting jointly in this transaction, and the liability arising out of the transaction, if any, was joint and several. Each was to share equally in the profits. Baldwin-Pope knew the tomatoes were being purchased and entered into a contract for resale in New York before complainant sold them, and notified Buck it had found a buyer. The Secretary of Baldwin-Pope Marketing Co. testified that Buck was not allowed to make purchases unless he had instructions from Baldwin-Pope. Baldwin-Pope was to furnish the money for payment of the purchase price and did pay for one accepted car with its own check. Prior transactions had been had between the parties, in which complainant was selling and Baldwin-Pope and Buck were purchasing jointly.

2. There was nothing in writing to show what agreement there was, if any, with respect to the time the rejected car was to be diverted. Buck testified he gave the shipper diversion instructions on May 28; complainant contended they were not received until the morning of May 31. Both rejected cars were diverted on May 31. It was unreasonable to believe that complainant would have billed the second rejected car, shipped on May 29, in his own name if he had received instructions on May 28 to have billed or diverted the cars to the Baldwin-Pope Marketing Co. In a telegram to Buck dated May 31, Baldwin Pope said "***if shipper's error in diverting us don't think our customer will take car as will be delayed one day ***." This statement indicated that Baldwin-Pope did not know whether the shipper had been instructed to divert the car. Buck testified that at the time the cars were purchased he did not know the point of destination. This indicated the improbability of giving any diversion instructions at the time the sale was consummated. These facts, while having some bearing upon the question of whether the car was properly diverted, were not conclusive. They did in a measure, however, then to corroborate the testimony of the complainant. One thing was clear, and that was the telegram confirming the purchase, the only portion of the contract in writing, was completely silent with respect to the question of diversion. Respondents failed to prove by a preponderance of the evidence that the car was to have been diverted at any particular time. This burden of proof rested upon respondents. In the absence of a specific time for diversion, complainant would have a reasonable time in which to divert. The evidence showed that the car was shipped to St. Louis, the city in which the purchaser was located, and diverted the morning of May 31, shortly after its arrival in St. Louis. There was nothing in the record to show that complainant was informed or had any reason to believe that the respondents intended to divert the car elsewhere. From all the evidence, it was concluded that respondent failed to show that the car was not diverted in accordance with instructions received from respondents. The rejection was therefore without reasonable cause.

3. With reference to the car rejected because it was not shipped at the proper time, complainant contended he informed Buck it could be loaded for shipment on May 28 if he insisted upon it and that Buck informed him that shipment the next day would be satisfactory. Buck testified that the contract called for shipment on May 28. The testimony on this point was in direct conflict. A telegram dated May 28 received by Baldwin-Pope from Buck gave the numbers of all the cars purchased with the exception of the sixth car (the car in question). With respect to that car it was stated "sixth car later." The fact that it gave the car numbers indicated that it was sent after the contract of sale was consummated. It further showed that respondent Buck had knowledge of the fact that the sixth car would not be shipped on May 28, thereby corroborating the testimony of complainant. The telegram further indicated that Buck did not reject or refuse the sixth car when he learned that it would not be shipped on May 28. Otherwise, he would not have advised Baldwin-Pope that the sixth car was to be shipped later. From the evidence as a whole, it was concluded that the respondents, through Buck, assented to the shipment of this car on May 29. Therefore, the rejection of the car was without reasonable cause.

4. Complainant resold the tomatoes contained in the two rejected cars for the net sum of \$899.66, thereby suffering a loss in the amount of \$1245.34, the difference between the net sum received from resale and the contract price. Complainant was awarded \$1245.34, plus interest. Petition of Baldwin-Pope Marketing Co. for reconsideration was denied. Thereupon the same respondent filed an appeal to the Federal District Court which, on October 7, 1941, decided that respondent rightfully rejected the shipments and set aside the Secretary's order, the Court also assessing the costs of the suit against the complainant.

S-2509, October 26, 1940, Docket 3466: (Hearing)

D. L. PIAZZA BROKERAGE CO., MINNEAPOLIS, MINN. v. OZARK FRUIT GROWERS ASSOCIATION, INC., MONETT, MO.

Violation charged: Failure to deliver in accordance with contract two carloads of strawberries.

F-1 Principal points involved: Rights and liabilities under original contract extinguished by new contract of settlement.

Order: Complaint dismissed.

Outline of Facts

On or about May 29, 1939, complainant contracted to purchase from respondent two carloads of strawberries at the agreed price of \$2.75 per crate f.o.b. loading point at or near Monett, Missouri,

and respondent made shipment to complainant at Minneapolis, Minn. Before arrival at destination respondent, upon the representation of complainant that the market had declined, agreed to reduction of the contract purchase price from \$2.75 to \$2.65 per crate. Instead of paying the agreed amount, on or about June 8 complainant accounted to respondent on the basis of the proceeds received from sale of the strawberries, less commission and expense, because of alleged failure of respondent to ship strawberries which met the specifications of the contract of sale. The accounting was rejected by respondent, who insisted upon payment of the amount agreed upon. On or about June 15, the parties entered into a settlement agreement whereby complainant paid to respondent \$2060.54, or the contract price less a further allowance of 25 cents per crate. Complainant sought to recover part of the payment made under the settlement agreement, measured by the difference between the net amount received from sale of the strawberries and the amount paid to respondent, contending that the contract called for shipment of U. S. No. 1 strawberries and that the ones shipped were not of that grade, and that under the terms of the settlement agreement respondent was to furnish shipping point inspection certificates showing the berries graded U. S. No. 1 at shipping point and that the inspection certificates furnished showed that a portion were not of that quality.

Respondent contended that he never agreed to deliver U. S. No. 1 strawberries and that in settling the dispute by making a further allowance of 25 cents per crate it did not agree to furnish Federal inspection certificates which would show the berries graded U. S. No. 1.

Rulings included in Decision

1. The contract of sale was negotiated over the telephone and was entirely oral and the terms were not at all clear from the evidence. It was clear from the testimony of the witnesses that at the time of the hearing they did not have a definite present recollection of the terms thereof. From the evidence of record it could not be said that complainant showed, with the degree of certainty required, that the respondent agreed to deliver strawberries that would grade U. S. No. 1 at shipping point. However, it was not necessary to determine the exact terms of the original contract, because the parties, after the shipments had been received, inspected and sold, and after the dispute as to the amount complainant owed respondent arose, entered into a new contract of settlement whereby it was agreed to settle the entire dispute upon the payment of a certain sum. The original contract was thereby merged into the later one and all rights and liabilities created by the former contract were extinguished by the latter, except insofar as they were preserved by it.

2. The only issue to be determined was whether respondent failed to perform any duties created under the later agreement. The evidence did not support complainant's contention that as a condition to full and complete settlement of the dispute respondent was to furnish Federal inspection certificates showing the strawberries graded U. S. No. 1 at shipping point. The dispute between the parties apparently arose because of condition of the berries upon arrival and not because of grade. Respondent's representative testified that the agreement of settlement was negotiated orally over the telephone and that he did not agree to furnish shipping point inspection certificates and that the settlement agreement was made with the understanding that the loss on the transaction was being shared and that he was willing to enter into the agreement so that settlement could be made with the growers.

3. Since complainant failed to show that respondent violated any provision of the act, the complaint was dismissed.

S-2510, October 26, 1940, Docket 3609: (S.P.)

ZIMEL FRUIT CO., ROCK ISLAND, ILLINOIS v. A. W. McCONN CO.
MOORHEAD, MINNESOTA

Violation charged: Failure to deliver two carloads of potatoes in accordance with contract.

D-16
F-11
Principal points involved: In f.o.b. sale shrinkage occurring after sale is ordinarily the buyer's loss; evidence did not show that parties contemplated contract was severable.

Order: Complaint dismissed.

Outline of Facts

On or about October 5, 1938, respondent sold to complainant 10 cars, of 360 bags or 600 bushels each, of Red River Valley potatoes, 7 of which were Cobblers and 3 Ohios, at 50 cents per 100 lb. bag, f.o.b. loading station. They were shipped from loading points in Minnesota and North Dakota to respondent's warehouse at Wolverton, Minnesota, where they were to be stored for 7 cents per bushel, or \$42 per car, plus labor, inspection and other charges, shipment to be made to complainant at his order, he to pay freight and other costs. During October complainant paid respondent the purchase price, plus infreight from loading stations to Wolverton for each of the 10 cars. Between January and April, 1939, at the order of complainant, respondent shipped, in interstate commerce, 8 of the 10 cars, complainant or his vendee paying freight, plus labor and inspection charges. In April he ordered the remaining two cars, one of Ohios and the other Cobblers. Respondent was unable to send the shipments for the reason that there had been a shrinkage of 335 bags

of Cobblers and 161 bags of Ohios, leaving only 199 bags of Ohios in the warehouse, but he offered either to sell complainant enough additional potatoes to fill the order or to purchase the 199 bags of Ohios for \$124.38. Complainant rejected both proposals and returned, uncashed, the check for \$124.38 which respondent tendered.

The theory on which complainant sought to charge respondent with shrinkage loss was not clear, although three possible bases of recovery might be culled from the complainant's evidence: (1) That, by agreement of the parties, respondent assumed the burden of reconditioning the shrinkage; (2) that respondent agreed to deliver the 10 cars to complainant at a cost of from \$1.12 to \$1.14 per bag, all expenses included; (3) that the contract was a severable one for each car, that such shrinkage as there was should have been deducted from each car as it was shipped rather than entirely from the last two cars ordered, and that respondent's failure properly to apportion the shrinkage constituted a failure to deliver in accordance with the terms of the several contracts.

Rulings included in Decision

1. In an f.o.b. sale, shrinkage occurring after sale is ordinarily the buyer's loss. In order to overcome the force of this presumption, complainant sought to show the existence of the special agreements upon which his first two positions were dependent. Those agreements, which were evidently unwitnessed oral agreements, were specifically denied by respondent. The only evidence supporting their existence was the sworn statement of complainant, which was refuted by respondent's affidavit. Complainant's statement, under those circumstances, was not sufficient to meet the required burden of proof.

2. With reference to complainant's third position, which impliedly admitted that he was to bear all loss from shrinkage, it was in no way shown that respondent's failure to allocate shrinkage loss to particular cars resulted in detriment to him. Thus, at best, complainant was entitled to only nominal damages under this approach. In addition, his position was weakened by the fact that, while he necessarily knew there would be some shrinkage by April in potatoes purchased six months before, he accepted eight full cars from respondent without making either inquiry or objection to the absence of shrinkage deductions. Also, there was no allegation or proof that respondent's noncompliance with the alleged several contracts was "without reasonable cause," as required by the act. Finally, while complainant cited authority indicating that the contracts were severable, there was no evidence that the parties contemplated that each shipment would be severable to the extent that it would be separately stored in the warehouse, so that, when complainant ordered further shipments from the warehouse, respondent could be held to know that an order for a "car" meant an order for any identifiable lot of potatoes rather than a shipment of 360 bags, or 600 bushels, the latter being the meaning ascribed to the term by the parties in their earlier dealings.

3. Since complainant failed to prove, by a preponderance of evidence, that respondent violated section 2 of the act, the complaint was dismissed.

S-2513, November 2, 1940, Docket 3351: (Hearing)

BURNAND & CO., LOS ANGELES, CALIF. v. JOHN MOON & SON, ST. LOUIS, MO.

Violation charged: Unjustified rejection of a carload of tomatoes.

F-3

Principal point involved: Mere acceptance of document from seller's agent without refusing or returning it, does not give rise to an enforceable contract - some manifestation of assent by prospective buyer is required.

Order: Complaint dismissed.

Outline of Facts

On or about December 28, 1938, complainant shipped a carload of tomatoes from Mexico to respondent. Toronto, Canada, stop at St. Louis for inspection by the broker, Hathaway Distributors, Inc.; and he claimed that the shipment was sold to the respondent, through respondent's employee, at \$1.12½ per package. Upon arrival at St. Louis the car was tendered to the respondent but was rejected, and complainant asked for an award of damages sustained by reason thereof. Respondent denied that he or his employee purchased the car, or that his employee had any authority to make purchases for respondent.

In a letter written to the Department by the broker it was stated that respondent's employee ordered the tomatoes at \$1.12½ per lug f.o.b., plus 5¢ crossing charge, but his testimony at the hearing was confusing and did not support the statement made in his letter. In support of his contentions, complainant also relied on a communication from the Wabash Railroad to the Southern Pacific Railroad dated January 7, stating that the car was "undelivered Moon advises will handle," a copy of a letter from a Customs broker stating "inspection was allowed to John Moon & Son by Inspector J. Russler" and an accompanying copy of an application to the U. S. Customs Service for a permit to obtain immediate delivery of the car, purported to have been executed by John Moon & Son.

Rulings included in Decision

1. A mere reading of the testimony of the witnesses relative to the three documents mentioned above showed that they were entitled to but little weight and were not controlling in the case. An employee of the Wabash Railroad was unable to state who had informed him that Moon would handle the car. The Customs broker testified he did not prepare the application for immediate delivery of the car. Copy of this document was furnished to the Department by Hathaway Distributors,

Inc. and the witness was unable to state where he had obtained it. John C. Russler, an Inspector of Customs for the U.S. Government, testified that it was not a copy of any document on file in that office. The evidence showed that the application was prepared by an employee of Hathaway Distributors, Inc. and it was never filed with the Collector of Customs. The attempt of Hathaway to use it as evidence of the purchase of the car by respondent, when he knew or should have known the true facts, materially reflected upon his credibility.

2. It was not possible from the testimony of Hathaway to ascertain what, if any, contract was made. The only clear inference obtained from his testimony was that he had practically no recollection of the substance of the oral conversations between him and respondent's employee. His apparent lack of memory, his frequent contradictions, and his inability to answer questions concerning the transaction almost completely destroyed the evidentiary value of his statements relative to the sale of the carload of tomatoes. In fact, one was practically compelled to conclude from his testimony that no contract of sale was consummated. He may have honestly thought that respondent would accept the tomatoes for \$1.12 $\frac{1}{2}$, but he failed to show the creation of a contract under which respondent obligated himself to accept the shipment. Assuming that the statement attributed to respondent's employee was made to the effect "O K but my boss wanted to pay \$1.10," standing alone, free from the remainder of his testimony, it would be insufficient to establish an enforceable agreement without further proof of the authority of respondent's employee to bind his employer. The statement attributed to respondent's employee, if made, would seem to indicate that he was acting contrary to the instructions of his employer. This was particularly true if respondent's employee, as Hathaway contended, frequently conferred with his employer to obtain instructions. The employee of the broker who delivered the file of papers to complainant testified he did not know whether a confirmation of sale was included among the papers, as was contended by the broker. A copy of the confirmation alleged to have been delivered was included in complainant's evidence but such confirmation, standing alone, if shown to have been delivered, was insufficient to bind the respondent. The confirmation was not on the standard form usually used by brokers and it showed, on its face, that Hathaway Distributors, Inc. was the agent of the shipper only. One person, by delivering to another documents executed by himself, cannot create a contract between himself and that person without a manifestation of assent in some manner by the person to whom the documents are delivered. While it may be sound business practice for a person to refuse to accept or to return documents so delivered, the failure to do so is not fatal. Under the circumstances of this case, it would not seem unusual for an employee of the respondent to accept such documents, particularly when the employee was aware of the fact that certain negotiations had been or were being carried on with his employer. The mere acceptance of papers under such circumstances does not give rise to an enforceable contract. Moreover, it was not definitely clear that the papers were not returned to Hathaway Distributors, Inc. Respondent's employee, who left that employment on or about January 7, 1939, a few days after

the transaction took place, testified that he might have returned the papers but he did not remember.

3. Because of the inability of Hathaway Distributors Inc. to show the existence of a contract, complainant failed to sustain the burden of establishing by a preponderance of the evidence such facts as warranted recovery of the alleged loss. The complaint was therefore dismissed.

S-2522, November 8, 1940, Docket 3141: (Hearing)

S. STROCK & CO., BOSTON, MASS. v. WESTERN FRUIT GROWERS, INC. and T.H. PEPPERS, LOS ANGELES, CALIF. and J.L. SULLIVAN, PHOENIX, ARIZONA.

Violation charged: Failure to pay a deficit incurred in selling 12 carloads of juice grapes on consignment.

Principal point involved: Agency could not be established by declarations of agent.

Order: Complainant awarded \$3840.35, plus interest against J.L. Sullivan; complaint dismissed as to Western Fruit Growers, Inc. and T.H. Peppers.

Outline of Facts

Complainant alleged that on or about October 19, 1937, Western Fruit Growers, Inc., through its agent J.L. Sullivan, secured from complainant, through its agent Moe Strock, cash advances totaling \$4,300, plus packing and loading materials in the amount of \$217.73, a total of \$4517.73; that Western Fruit Growers consigned to complainant 12 carloads of grapes, shipped from Modesto, California to Chicago, Illinois, which were sold for the account of that corporation for a total of \$7868.25, and that complainant paid railroad charges and other expenses, including commission of 7%, totaling \$11,708.60, thereby incurring a deficit of \$3840.35; that J.L. Sullivan arranged, at the suggestion of T.H. Peppers, agent of Western Fruit Growers, for Peppers to meet Moe Strock for the purpose of reimbursing complainant, but the meeting never took place, and complainant asked for an award in the amount of the deficit.

Western Fruit Growers denied that J.L. Sullivan ever was its employee or agent, that it secured any advances from or consigned any merchandise to complainant; Peppers denied that any arrangement was made with him for reimbursement of complainant; and Sullivan alleged that in the transaction described above he acted as agent for Western Fruit Growers under the personal appointment of Peppers.

The record showed that during the period October 13 to 21, 1937, inclusive, Sullivan packed and loaded 20 cars of grapes, but he did not have sufficient funds to cover the picking and loading expenses; that he told Moe Strock of his difficulties and that he had the bills of lading covering 12 cars which had been loaded for Western Fruit Growers, to whom they belonged (they were invoiced to Western Fruit Growers), and proposed diverting them to Strock's firm and giving him the bills of lading for an advance of \$4,300, with the understanding that Strock's firm would handle the cars for the account of and remit to Western Fruit Growers, less commission, unless Western Fruit Growers wanted the cars back, in which event they would return the money and repossess the shipments; that this arrangement was satisfactory to Strock, who advanced the necessary funds to Sullivan without getting in contact with Western Fruit Growers or T.H. Peppers to verify Sullivan's authority; and that on or about October 24, T.H. Peppers was to meet Moe Strock in Modesto and would have given Strock a check for \$4517.73, the amount of the advance, at that time, if the meeting had taken place, in order to get possession of the bills of lading covering the 12 cars diverted to complainant.

Rulings included in Decision

1. Since the evidence did not establish the agency of J.L. Sullivan, the complaint was dismissed as to T.H. Peppers and Western Fruit Growers. Although J.L. Sullivan represented himself as agent for Western Fruit Growers, Inc. to Moe Strock, and in his contracts with growers, yet the evidence was not sufficient to charge Western Fruit Growers, Inc., or its representative, T.H. Peppers, with knowledge of such representations. Therefore, there was no estoppel and the agency could not be established by the declarations of J.L. Sullivan. Sullivan had been instructed to bill cars to Western Fruit Growers, Inc., which he did. The 12 cars in question, while in transit, were diverted to S. Strock & Co. without the knowledge or consent of respondents T.H. Peppers and Western Fruit Growers, Inc., nor did they afterwards ratify the transfer. Even if Peppers had refunded the advance to Strock and secured the return of the cars to Western Fruit Growers, Inc., this would not have made Sullivan the agent of Western Fruit Growers, Inc. Moe Strock failed to get the diversion of the 12 cars approved in advance or later ratified by either Peppers or Western Fruit Growers, Inc.

2. The arrangements of T.H. Peppers with Sullivan were consistent with the claim that Western Fruit Growers, Inc. was advancing money for the purchase of cars f.o.b. Modesto, California from Sullivan, under which circumstances Sullivan was an independent packer and shipper. The evidence showed that Sullivan sent Western Fruit Growers accounts and records of purchases covering at least 44 cars of grapes packed and sold by him to Western Fruit Growers; that a loading deal was entered into by Peppers, who was supervising the Lodi & Stockton districts during the grape season, and Sullivan, who was packing and loading grapes at Modesto, from which Sullivan

was to realize \$1 a ton, Sullivan being instructed to bill the cars to Western Fruit Growers under bond of that company, and neither Western Fruit Growers nor Peppers exercised any control over the purchase of grapes from the vineyards, but relied on Sullivan in that respect; and that Western Fruit Growers advanced to Sullivan \$22,565.80 in 10 checks and one draft, all of which Sullivan deposited to his personal account, which was later changed to a trustee account. Complainant awarded \$3840.35, plus interest, against J.L. Sullivan

S-2531, November 25, 1940, Docket 3565: (Hearing)

L. GILLARDE CO., CHICAGO, ILLINOIS v. HERMAN FRANZBLAU, INC., DETROIT, MICHIGAN.

Violation charged: Failure to account for carload of lettuce.

Principal point involved: Complainant failed to establish by a fair preponderance of the evidence that the lettuce conformed to contract specifications.

Order: Complaint dismissed provided respondent again tender to complainant \$244.93.

Outline of Facts

On or about October 17, 1939, complainant sold to respondent a carload of best quality lettuce then on track at Chicago at the agreed price of \$4.65 per crate f.o.b. Chicago, Illinois, or a net invoice value of \$1091.97. The car was diverted from Chicago to Detroit, Mich. Complainant claimed that the lettuce was of the kind, quality and grade called for in the contract of sale and that upon arrival respondent accepted it but has refused to pay the agreed purchase price, and asked for an award of \$1091.97.

Respondent stated that Watex brand lettuce was purchased; that Par-Plus brand was shipped, which was of a different kind and quality than ordered; that upon finding the lettuce ribby, dirty and of an inferior kind, quality and grade inspection was ordered and on October 18 complainant was informed over the long distance telephone that it was not the kind ordered and would not be accepted, but complainant urged respondent to "work on it" for the account of complainant and sell it for the best price obtainable; that respondent agreed to handle the lettuce, and on October 26 rendered to complainant account sales and tendered a check for \$244.93, representing net proceeds of sale, which complainant refused to accept. Complainant denied that the contract called for Watex brand. Each offered testimony of witnesses in support of his contention.

Merchants Perishable Inspection Service inspection on October 18 showed:

"Iceberg Lettuce - Quality is poor, Stock mostly slightly muddy on outer leaves, 30 to 35% clean; medium trimmed; practically all heads ribby; mostly fairly firm to firm. Average 50% severe defects, one-third of which is Tip Burn and balance soft heads.

"Butts of all heads reddish color and balance pale green. Stock is crisp. From Q to 13% average 5% Bacterial Soft Rot, affecting one or two leaves deep and areas of 1" to 2" in diameter."

Counsel for each of the parties agreed that the Secretary of Agriculture take judicial notice of the market prices of lettuce at Detroit, Michigan, as shown by the Agricultural Marketing Service of this Department between October 17 and October 25, 1939, inclusive. These official market reports showed that during this period the prices were dropping and the demand was slow.

Ruling included in Decision

Complainant failed to establish by a fair preponderance of the evidence that the lettuce conformed to specifications of the contract. There was a direct conflict in the testimony as to whether respondent definitely ordered Watex brand. The telegram sent by complainant to respondent on October 17 at 8:45 a.m., reading DIVERTING YOU *** 312-5 PARPLUS BRAND *** WE CONSIDER THIS CAR LITTLE BETTER THAN WATEX AND ONE OF THE REASONS WHY WE DIDNTGIVE YOU CAR WATEX IS BECAUSE WE SOLD A BROKER HERE CAR OF WATEX AT 4.75 FOR DETROIT AND DIDNT THINK IT ADVISABLE TO HAVE ANOTHER CAR WATEX IN THERE AGAINST YOU ***", lent some weight to the respondent's testimony that the lettuce was to be Watex, as the complainant attempted to explain why that brand was not shipped. Both parties agreed, however, that the lettuce was to be the best complainant had. Inspection certificate by the Merchants Perishable Inspection Service showed the quality was poor, some of the outer leaves muddy, practically all heads ribby, with an average of 50% severe defects. It was true that the complainant contended that this was not a Federal inspection and, therefore, little, if any, weight, should be attached thereto. Neither party obtained the services of a Federal inspector although inspectors are located at both Chicago and Detroit. The inspection made of the lettuce by direction of the complainant was not introduced in evidence although the respondent sought to have it offered. The complaint was ordered dismissed, provided respondent again tendered to complainant \$244.93.

S-2535, November 25, 1940, Docket 3680: (S.P.)

J.E. NELSON, ALTOONA, PA. v. TURLOCK FRUIT CO., TURLOCK, CALIFORNIA

Violation charged: Failure to pay brokerage fees and repay outlay for freight in connection with 10 carloads of grapes.

Principal point involved: No deduction allowed respondent in absence of proof of alleged loss.

Order: Complainant awarded \$258.50, plus interest.

Outline of Facts

The record stood undisputed to the effect that during October 1939 complainant, acting as broker for respondent, sold for him 10 carloads of grapes between the 11th and 27th of the month, shipment of which was made from California to purchasers in Altoona, McKeesport and Uniontown, Pa., for which service complainant was to receive the customary brokerage fee of \$25 per car. Complainant, in addition to the brokerage, asked for \$8.50 paid out for difference between the freight allowed by respondent and that paid by complainant on one carload.

Respondent, in his answer, admitted that the brokerage and \$8.50 for difference in freight were due, but claimed that complainant had him hold on track at Pittsburgh an additional 24 hours one car confirmed to a purchaser in Altoona, Pa., and then, upon arrival, it was refused by the purchaser due to condition. Respondent thought he was entitled to remuneration to some extent for loss of 12 $\frac{1}{2}$ each on 1173 lugs, or \$146.62.

Ruling included in Decision

No proof whatever was submitted in support of the alleged loss claimed to have been sustained by respondent or to show that complainant was responsible for it, if it was sustained. Under the circumstances complainant was awarded the full amount claimed, or \$258.50, plus interest. Since the award has been paid and there seemed to be no urgent need for publication of the facts, the order, upon petition of respondent, was modified by order dated January 23, 1941, omitting publication.

S-2537, December 4, 1940, Docket 3292: (S.P.)

MORRIS L. WIENER, McALLEN, TEXAS v. WEST MICHIGAN GROWERS & SHIPPERS ASSOCIATION, MUSKEGON, MICHIGAN.

Violation charged: Failure truly and correctly to account for a carload of apples handled on joint account.

Principal points involved: Relationship of parties to joint account transaction is one of contract; failure to conform to contract, when manner of performance outlined, constitutes breach, making him liable for loss.

Order: Complainant awarded \$17.89, plus interest; countercomplaint dismissed.

F-19
H-18
M-25

Outline of Facts

The record established certain facts as being undisputed: On or about September 15, 1938, complainant and respondent entered into an agreement whereby complainant was to acquire and respondent to sell a carload of apples, for their joint account. On or about September 17 complainant presented an invoice to respondent showing that 516 bushels had been loaded and shipped to a purchaser at Milwaukee, Wis., and respondent paid complainant \$263.50, one-half the cost of the shipment. When the car arrived at Milwaukee it was rejected by the purchaser because of failure of the apples to meet the requirements of U.S. No. 1 grade. At the request of respondent, resale was made by the rejecting purchaser for the account of respondent for net proceeds of \$288.98, after securing inspection certificate showing the fruit was packed under three marks and failed to grade U.S. No. 1. Complainant was advised of the reason for rejection and to protect himself against the growers, and he did receive refunds from the growers amounting to \$105. Respondent deducted from the remittance of \$288.98, \$17.89 for alleged expenses and \$263.50 which had been paid to complainant, and sent to complainant the balance of \$7.59. Complainant claimed the parties did not specify U.S. No. 1 grade apples and that they were inspected and shipped by Max Karas, the agent of respondent, and he was entitled to corrected accounting.

Respondent stated that the contract called for U.S. No. 1 apples to be packed by complainant personally, thus insuring the grade, or that he was to have them packed by a packer whose pack would be accepted because of that firm's membership in the respondent association, and denied a principal and agent relationship with Max Karas.

Rulings included in Decision

1. Complainant failed to prove the alleged relationship between Max Karas and respondent.

2. Because of the contradictions in the statements of fact submitted by the parties, it was necessary to consider and test the statements in the light of the circumstances surrounding the transaction in order to determine the true terms of the contract. That procedure substantiated the statements made by respondent. The fact that respondent sold the apples as U.S. No. 1 grade to the Milwaukee purchaser before shipment and before any controversy between complainant and the respondent, the fact that the invoice delivered to respondent by complainant at the time of shipment described the apples as U.S. No. 1, the fact that the respondent immediately informed complainant of the failure of the apples to grade U.S. No. 1 and advised him to protect himself with the growers, and the fact that complainant was able to recover \$105 from the growers, substantiated the statement of the respondent's manager that the complainant agreed to furnish U.S. No. 1 apples. It was also pertinent to note that the complainant did not deny that he promised to ship apples graded by

himself or by the packing firm designated by respondent. The relationship of the parties in a joint-account transaction is one of contract. Each party owes a duty to the other party to perform the acts required by the contract. If the contract does not specify the manner in which each party shall perform his duties, the party alleging the loss must show that the loss resulted from negligence or bad faith. However, when, as in this case, the manner of performance is specifically outlined, failure to conform to the contract constitutes a breach which entitles the injured party to recover. The fact that respondent accepted the goods did not affect the responsibility assumed by the complainant to furnish apples of U. S. No. 1 grade.

3. Respondent's counterclaim for damages in the amount of the difference between the cost of the apples and the price for which they were sold was denied in the absence of any proof other than respondent's own statement as to the terms of the resale contract. Consequently, respondent was entitled to retain from the net proceeds received an amount equal to the amount paid for a one-half interest in the apples. No proof was submitted to show that the telephone and telegraph expenses which were deducted from the net proceeds were actually incurred or that they were necessarily incurred because of the complainant's breach of the contract and were properly chargeable against complainant. Complainant was therefore awarded \$17.89 and the countercomplaint was dismissed.

S-2542, December 11, 1940, Docket 3617: (S.P.)

NATE SAVITZ CO., PHILADELPHIA, PA. v. WILLIAM SHAPIRO, INC. NEW YORK CITY, and FRY DISTRIBUTING CO., CHICAGO, ILL.

Violation charged: Failure to deliver in compliance with contract a carload of tomatoes.

Principal points involved: Tomatoes 75% U.S. No. 1 and 9% soft, 5% puffy, when shipped and 15-20% shriveled upon arrival did not meet specification "good healthy stock"; contract not affected by broker's wire subsequent to confirmation.

F-17
P-5
P-8
F-1
F-42

Order: Complainant awarded \$273.59, plus interest; countercomplaint dismissed.

Outline of Facts

On October 20, 1939, Fry Distributing Co. wired complainant HAVE GUADALUPE TOMATOES GOOD HEALTHY STOCK 6x6's AND LARGER ALLSTAR BRAND ABOUT ONE-FOURTH COLORED OFFER SUBJECT TO CONFIRMATION AT \$1.50 CHICAGO ANSWER QUICK IF INTERESTED, in an attempt to sell for William Shapiro Co. two cars of tomatoes, then standing on tract at Chicago. There was no positive showing as to what was said in the ensuing telephone conversation complainant had with Fry, but after it was completed complainant wired him WILL ACCEPT CAR ALLSTAR

TOMATOES *** DIVERT OURSELVES PENNSYLVANIA DELIVERY. Some time on October 20 complainant, in reliance upon such description as may have been given him by Fry, contracted to sell the tomatoes to American Sotres Co. at \$1.85 per lug, or for a total of \$1,110 f.o.b. Philadelphia, Pa., representing a profit of \$125.36 to complainant. On arrival of the car at Philadelphia American Stores refused to accept delivery at Philadelphia, claiming the stock did not meet contract requirements, and complainant attempted to reject the car to respondents but they refused to release him or grant any allowance. Complainant therefore diverted the shipment to New York City, where sale was made for the gross sum of \$382.75. Since the cost incident to handling amounted to \$530.98, complainant suffered a loss of \$148.23. Award was asked for recovery of \$148.23 plus \$125.36, or \$273.59.

Respondents denied all liability to complainant and by way of countercomplaint demanded payment from complainant of the net contract purchase price of \$555.28.

The record contained no reliable showing of quality and condition at Chicago, but Standard Inspection Service certificate of inspection at Philadelphia on October 23, the approximate time of arrival at that market, showed that an average of 4% decay was found, and that 15 to 20% of the tomatoes were shriveled and generally "watery when cut." This corresponded with certificate of Federal inspection (restricted to the two top layers of lugs) at the same market two days later, showing an average of about 5% decay and 15% soft and watery. The Federal certificate stated that the shipment "fails to grade U.S. No. 1 due to excessive defects in some lugs and now shows approximately 60 percent U.S. No. 1 quality." This also corresponded reasonably well with the certificate of Federal-State inspection made at Guadalupe, on October 11, showing that the shipment then "averages approximately 75% U.S. No. 1 quality." Under "Quality" and "Condition," this certificate showed "Tomatoes generally mature green and firm; mostly smooth and well formed; some fairly smooth and fairly well formed. Defects range from 13% to 37%, averaging approximately 23%, consisting of 9% soft, 5% puffy, remainder mostly growth cracks, bruises or worm injury. No decay."

Rulings included in Decision

1. So far as the record disclosed, the negotiations provided for the sale of 600 lugs at \$1.50 per lug, or \$555.21 f.o.b. Chicago, Ill. It was reasonably certain that the final offer was made by Fry during the telephone conversation with complainant, who confirmed his acceptance by wire as quoted above. This acceptance wire mentioned brand only, but Fry admitted that "good healthy stock," as specified in his final telegram, was made a part of the contract of sale, although he did not include it in his standard memorandum of sale.

2. Respondents failed, without reasonable cause, to deliver a carload of tomatoes which met the contract requirements. Inspection at Guadalupe on October 11, the approximate date of shipment, showed that the stock then graded approximately 75% U.S. No. 1 quality and showed 9% to be soft and 5% puffy. Certificate of standard inspection at Philadelphia on the day of arrival showed 15 to 20% were shriveled and generally watery when cut, while Federal inspection at the same market two days later showed the tomatoes graded only 60% U.S. No. 1 quality. This certificate also showed that 15% of the tomatoes were soft and watery. Complainant was awarded \$273.59, plus interest, jointly and severally against respondents.

3. Respondents' countercomplaint was dismissed.

Reconsideration

Respondents filed a petition for reconsideration of the order, contending that no consideration had been given to the effect upon the contract of the telegram sent by the Fry Distributing Company to complainant reading "CONFIRM 1.50 DELIVERY CHICAGO BASIS CHICAGO INSPECTION ACCEPTANCE FINAL * * *." The Secretary held that the contract was completed by the exchange of the two wires first quoted above and the Fry Distributing Company could not, by sending its second wire, affix any contractual provisions. The contract, therefore, was not affected by the specification "Chicago inspection acceptance final" which was included in the broker's memorandum of sale. Time for payment of the award was extended to April 7, 1941, and publication was eliminated.

S-2548, December 13, 1940, Docket 3284: (Hearing)

HULL PACKING CO., PAHOKEE, FLA. v. T. MENDELSON CO., INC.,
PITTSBURGH, PA.

Violation charged: Unjustified rejection of a carload of beans.

Principal point involved: Federal inspection certificates are prima facie evidence of truth of statements contained therein, but this does not mean such statements cannot be rebutted; other evidence not sufficient to overcome Federal inspection certificate.

Order: Complainant awarded \$942.72, plus interest;

N-13

Outline of Facts

On or about October 15, 1938, through a broker, complainant sold to respondent one carload, consisting of 572 hampers of U.S. No. 1, first picking Bountiful beans at \$1.40 per hamper f.o.b. shipping point, totaling \$800.80. Shipment was made from Florida to Pittsburgh, Pa., where the car arrived on or about October 19, and respondent, on or about October 21, after attempting to sell a portion of the car, rejected the beans. Resale at Pittsburgh resulted in a deficit of \$141.92, and complainant asked for damages in the amount of \$800.80 plus \$141.92, or \$942.72, claiming that the beans met the specifications of the contract.

Respondent stated that the beans were not of the quality and grade specified in the contract of sale. Depositions and testimony of witnesses were offered in support of the contentions of each side.

After inspection in Pittsburgh the broker's inspector reported the beans would not grade U.S. No. 1 and were "mostly dark green dull color. Most beans stained & scarred some rusty. Beans small to good size. Some hampers under size beans young & tender." Government inspection made after the shipper was informed that respondent was not interested in the beans, restricted to two upper layers, showed that they graded U.S. No. 1. "Fairly clean to slightly dirty, fairly bright, fairly young and tender, and fairly well to well formed. Average 7% grade defects, mostly scars. Generally fresh and firm, few slightly wilted. Less than 1% decay." Pittsburgh Federal inspector testified that the beans in the top half of a particular hamper were dirty and those in the lower half clean, but that he would classify the entire hamper as slightly dirty and as U.S. No. 1. He also testified that he and the other inspectors were shown 6 or 8 other hampers and that there was not enough dirt to justify throwing the stock out of grade. Most of the beans, he said, were fairly clean. Report of Railroad Perishable Inspection Service inspection on day of arrival read: "Two to six per cent of pods are ill-shaped. Most pods are slightly dirty. 15 to 25 per cent of pods scarred. Beans are generally fresh and have fairly good snap. Some pods are wilted next to covers. Less than one per cent pods show decay." Because it was reported that some hampers had been removed from the car a follow up inspection was made on October 21 and it was reported "Quality and condition same except stock slightly to considerably dirty from a black field muck. *** Occasional rust. Poor to only fair quality." A private inspector, who made inspection at request of respondent, found that the beans failed to grade U.S. No. 1 on account of defects and condition, "An occasional hamper noted showing from 4 to 10%, with most hampers showing from 20 to 40% of the stock having many small to large--mostly many, small scars, defects, and blemishes, and small rusty areas. Less 1% decay."

Ruling included in Decision

Federal grading standards require U.S. No. 1 beans to consist of beans of similar varietal characteristics which are of reasonable size, fairly well formed, fairly bright, fresh, fairly young and tender, firm, and free from damage (defined as any injury or defect which materially affects the appearance or the edible or shipping quality) caused by dirt or other means. They may contain some dirt and still meet the requirements of U.S. No. 1. Because of variance in testimony concerning the quality and condition of the beans, in order to reach a determination of the issues involved it was necessary to weigh the testimony of the witnesses and to balance probabilities in order to reconcile the apparent conflict. Each of the witnesses engaged in the produce business admitted he was not an expert at grading and that his opinion was based on observation gained from experience, while the grading of perishable commodities is a rather technical art. The difference between "dirty" and "slightly dirty" might be unapparent to a non-expert, while to an expert it may have an important technical bearing on the grade. Some recognition should also be given to the fact that inspectors for the Railroad Perishable Inspection Agency inspect commodities, not for the purpose of determining grades under the Federal standards, but for the purpose of protecting carriers against false and unjust claims. The report of one Railroad Perishable inspector tended to corroborate the Federal inspection report, with the exception of the percentage of pods scarred; the testimony of the other showed that he inspected the shipment after a portion of the load had been removed and returned, and that he found the beans slightly to considerably dirty. It was interesting to observe that what one Railroad Perishable inspector called "slightly dirty," the other described as "slightly to considerably dirty from black field muck." The private inspector indicated that he apparently confused the requirements of U.S. No. 1 with the requirements of U.S. Fancy, as he stated U.S. No. 1 beans must be clean, which is a grade requirement for U.S. Fancy. He found a far greater percentage of scars than were found by any other witness. It was hardly reasonable to believe that, if the beans contained the extent of scarring reported by this inspector, there would have been such a variance between the testimony of this witness and of all others on this point. Official inspection certificate showed that the beans contained defects averaging 7 percent, consisting mostly of scars. One of the witnesses of the respondent also testified that, in his opinion, the beans contained defects, consisting of scars, averaging about 7 percent. Respondent, at the time it requested the three Government inspectors to examine the beans, did not mention the fact that the beans contained scars, but questioned, primarily, the amount of dirt reported as being present. It was not reasonable to believe that, had the beans contained the percentage of scars as reported by the private inspector this fact would not have been raised directly by members of the respondent firm. In fact, respondent testified that he did not question anything except the dirt. The private inspector also reported "An occasional hamper of stock clean, with most hampers noted with most stock dirty."

Whether he reported as dirty what the Government inspector reported as slightly dirty, perhaps, will never be wholly free of doubt, but the report of the inspector for the broker, which did not mention any dirt being present at all, tended to indicate that the opinion of the Government inspector, that the beans were "slightly dirty," was more nearly correct. In weighing the testimony of the Federal inspectors and giving effect to official inspection certificates, it must be recognized that Government inspectors must undergo a period of official training. In this case, two Government inspectors, in addition to the inspector who originally examined the shipment, examined the beans, at the request of the respondent, and informed the respondent that, in their opinion based upon their examination, the beans met the requirements of U.S. No. 1 grade. Federal inspection certificates are admissible in all proceedings under the act, by all officials and courts of the United States, as prima facie evidence of the truth of the statements contained therein. That is not to say, however, that such statements cannot be rebutted. While such certificates are not conclusive evidence of the statements contained therein, full effect must be given to their prima facie character. The evidence was not sufficient to overcome the Federal inspection certificate and it was therefore held that the beans met contract specifications and respondent's rejection was without reasonable cause. Complainant was awarded \$942.72, plus interest.

S-2553, December 20, 1940: (S.P.)

JUSTMAN & CO., INC., NEW YORK, N.Y. v. VALLEY FRUIT CO., PHARR, TEXAS - Docket 3364 VALLEY FRUIT CO. v. JUSTMAN & CO. - Docket 3365

Violation charged: Failure by Valley Fruit Co. to deliver in accordance with contract a carload of grapefruit; failure by Justman & Co., Inc. to pay a guaranteed advance made on another carload of grapefruit.

Principal points involved: When property in goods has been transferred to buyer the goods are at buyer's risk; duty of shipper, upon receipt of payment, to change billing promptly to show property was in buyer.

Order: Justman & Co. Inc. awarded \$67.81, plus interest.

F-43

R-1

R-15

F-4

H-4

Outline of Facts

On or about March 13, 1938, through a broker, Justman & Co., Inc. bought from Valley Fruit Co. a carload of 426 boxes of Foster Pink grapefruit "Grand Prize" brand at \$1.30 per box, or a total price of \$553.80 f.o.b. shipping point. The original non-negotiable bill of lading showed that the shipment was received by the railroad from Valley Fruit Co. at Pharr, Texas on March 13 and was consigned to itself at New York City. On March 13, Justman sold the shipment while in transit at \$2.50 per box, or for the gross amount of \$1065 delivered at Philadelphia, with the understanding that it would arrive in time to be available to the purchaser for handling at auction on the morning of March 21, and filed a diversion order directing diversion to Philadelphia. The car arrived at Philadelphia in time to be available to the purchaser for handling at auction on March 21, but, because it was consigned to the Valley Fruit Co., the carrier was not legally required to deliver it to Justman or on his order, and instructions to change the designation of the consignee to read "Open Joseph Justman Co. Inc." were received at a time when it was too late for Justman to arrange to have the shipment promptly made available to the purchaser, who refused to accept it at a later date. Resale was made for net proceeds of \$216.75. Justman, because of alleged failure of Valley Fruit to bill properly or arrange with the carrier for release, claimed damages based on the original f.o.b. cost of \$553.80, plus repacking charge of \$42.60 inspection cost of \$2.50 and display expense of \$1.50, making a total of \$600.40, leaving an actual loss of \$383.65 after deducting \$216.75 received from resale. In addition, the claim covered loss of profit of \$71.56, arrived at by deducting \$553.80, plus freight of \$436.94 and diversion charge of \$2.70, or a total of \$993.44 from \$1065.

Justman alleged that immediately upon receipt of notice from the broker of consummation of sale it, on March 15, "wired guarantee of payment for said car pursuant to instructions to the First National Bank at Weslaco, Texas" and that it assumed that proper billing instructions would be given by Valley Fruit to the carrier. Valley Fruit stated that, since payment had not been made when the car was shipped, the billing was proper, and that Justman had knowledge of the billing and ample time in which to have it changed (by wiring Valley Fruit) before the car arrived at Philadelphia.

In connection with another carload of grapefruit shipped by Valley Fruit Co. from Pharr, Texas, to Justman, at New York City, on consignment, Valley Fruit Co. alleged that Justman failed to pay any part of a guaranteed advance of \$383.40. Justman admitted it was legally responsible to Valley Fruit Co. in that amount.

Rulings included in Decision

1. The carload of grapefruit purchased on or about March 13 was not delivered in conformity with the contract between the parties. Valley Fruit failed to submit any proof whatever that Justman had actual knowledge that the Valley Fruit Co. was still shown as the

consignee or that the Pennsylvania Railroad Company had informed it of such fact on the dates as alleged by him. However, assuming that such was the case, his contention that, if it had wired him of his failure to change the billing, he could have accomplished such a change promptly was specious. This was, in effect, a plea of contributory negligence. Aside from being an improper defense in a proceeding which was based upon alleged breach of contract, there was no legal duty, arising from contract or otherwise, upon Justman to notify Valley Fruit of his omission to change the original billing. Furthermore, section 22 of the Uniform Sales Act provides, in substance, that, unless otherwise agreed, when the property in the goods has been transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not, except that, where delivery has been delayed through the fault of either party, the goods are at the risk of the party in fault as regards any loss which would not have occurred but for such default. This, it appears, is, in substance, also the common law rule. In the instant transaction, therefore, it became the duty of Valley Fruit, upon receiving payment for the goods, to change promptly the billing to show that the property in and control of the shipment thereafter was in Justman, and, upon his failure to do so, the risk of loss resulting from such fault must fall upon him. Justman submitted no evidence in support of claimed expenditures for inspection and display and these items must therefore be disallowed, leaving the actual damages as \$379.65, which, added to the loss of profit of \$71.56, made total damages of \$451.21.

2. The failure of Justman & Co. Inc. to pay Valley Fruit Co. the guaranteed advance of \$783.40 agreed upon for the grapefruit in the second car mentioned above was in violation of the Perishable Agricultural Commodities Act. Justman & Co. Inc. was awarded \$451.21 less \$383.40, or \$67.81, plus interest.

S-2554, December 26, 1940, Docket 3439: (S.P.)

A.S. BURTON, NEW YORK, N.Y. v. HAVEN FRUIT CO., AUBURNDALE, FLA.

Violation charged: Failure to pay a deficit incurred in handling 4 carloads of grapefruit on consignment.

Principal point involved: Preponderance of evidence showing that shipments were consignments, shipper was liable for deficits.

Order: Complainant awarded \$445.49, plus interest.

Outline of Facts

Four carloads of grapefruit were shipped by respondents to complainant in September and October, 1938, on which, through his agent, J.T. Merrion, complainant advanced the total sum of \$1640, in three checks, the first of which contained on the face thereof the word "advance," the second and third being marked "accommodation advance." Each of the checks was endorsed by the agent and delivered to the respondents, who accepted and deposited them. Accounts sales on the shipments were rendered by complainant to respondents, each of which contained the word "advance" and showed itemized expenses in connection with the sale of the grapefruit, including commission, as well as showing a deficit on each car, the total of which amounted to \$445.49, for which amount complainant asked for an award.

Respondents denied liability, relying principally on a letter written to the complainant on September 27, 1938, reading, in part: "We are shipping you a car today through Joe Merrion. Joe is buying the car from us outright and I suppose speculating a little on it. We have plenty like this one to roll, but only on straight sales." Complainant maintained he had no record of receipt of this letter.

Ruling included in Decision

The preponderance of the evidence showed that the grapefruit was consigned by respondents to complainant to be handled on a commission basis and that there was a net deficit of \$445.49. Assuming that the letter quoted above was written to the complainant, it, nevertheless, appeared from the record that the three checks referred to were accepted by the respondents without any protest and at least one of these checks in the amount of \$640, dated October 7, was received by the respondents after September 27 and contained the words "accommodation advance." In the letter of September 27, in referring to the freight charges, it was stated, "If you have paid on that end for initial icing, all that is necessary for you to do is to produce the bill of lading and get a refund. There should be no deficit on this car, with the correct charge for freight." If respondents' contention was correct that the grapefruit was sold to Merrion, the agent of the complainant, it did not seem appropriate to refer to the deficit on the car of grapefruit. Complainant was awarded \$445.49, plus interest.

S-2556, December 26, 1940, Docket 3636: (S.P.)

URICK & HOLLIS, LOS ANGELES, CALIF. v. R.W. MCKINNEY, PADUCAH, KY.

Violation charged: Failure to pay balance of guaranteed purchase price of a carload of grapes.

Principal point involved: Having guaranteed purchase price, respondent liable to shipper upon bankruptcy of buyer.

Order: Complainants awarded \$412.51, plus interest.

Outline of Facts

On or about October 23, 1939, complainants, through respondent, agreed to sell to R.E. Hobbs Produce Co., a carload of 1098 lugs of Emperor grapes at \$1.07 $\frac{1}{2}$ per lug, or for \$1180.35, less freight, a net of \$617.76 delivered Paducah, Ky. Shipment of grapes of the kind and quality agreed upon was made from North Dinuba, California, billed to complainants "advise R.E. Hobbs Produce Co.," and the car was accepted by Hobbs. Upon arrival at Paducah, Ky., respondent telegraphed complainants to release the car and that he "will see Hobbs pays draft." The car was released to Hobbs who paid \$205.25, leaving a balance due of \$412.51, for which complainants asked an award against respondent.

Respondent claimed that upon receipt of complainants' wire "this your authority take delivery without lading * * * releasing * * *," he attempted to arrange for the release of the shipment but found that the carrier had received instructions from complainants to release the car to Hobbs, and that delivery had been made accordingly. Complainants contended that the release was made in the regular and usual manner, since the car was billed to Hobbs and respondent did not request that it be released to him. Complainants also contended that the release was granted only because of respondent's promise "will see Hobbs pays draft."

Ruling included in Decision

Respondent did not deny that he telegraphed complainants to release the car of grapes and that he "will see Hobbs pays draft." The shipment was released and the carrier and the respondent were each promptly informed by wire to that effect. Prior to the time Hobbs went into bankruptcy, complainants endeavored to collect the purchase price of the grapes from Hobbs and succeeded in collecting one-third thereof. They not only had the right to do so but this action also reduced the liability of the respondent as a guarantor. Following the bankruptcy of Hobbs, complainants filed a claim with the referee, in accordance with the suggestion of respondent. However, the record did not show that anything had been recovered against Hobbs. If anything were collected from the bankrupt, the respondent should, of course, receive credit. The complainants at no time released respondent as a guarantor; they, however, did make every effort to collect as much as possible against Hobbs. Complainants were awarded \$412.51, plus interest.

S-2563, January 17, 1941, Docket 3656: (Hearing)

Re: Application of Vincent Colace, Philadelphia, Pa., for a license under the Perishable Agricultural Commodities Act.

Principal point involved: Since applicant had been adjudicated a bankrupt and no reparation order had been issued against him, license was not denied.

Order: Vincent Colace granted a license to handle perishable agricultural commodities.

Outline of Facts

On June 21, 1940, the Department issued a notice of hearing and order to show cause why Vincent Colace's application for a license under the Perishable Agricultural Commodities Act should not be denied because of unfitness to engage in business, based on flagrant and repeated violations of the act by him and his partner, Carmen Campbell, through failure truly and correctly to account, during the period March, 1938 to May, 1939, for various lots of produce purchased in the current of interstate commerce.

Motion of the applicant's counsel, at the hearing, for dismissal of the proceeding on the ground that applicant was discharged in a bankruptcy proceeding on May 2, 1939, and that the alleged violations did not occur "within two years" as set forth in the act, no reparation award having been issued against either Colace or Campbell based on such violations, was denied.

Counsel for the applicant and for the Government stipulated that Campbell and Colace, as a general partnership, were engaged in handling perishable agricultural commodities from 1931 until April 1939; that payment in full was not made for purchases of produce in March, 1938 (covered by reparation complaint filed with the Department); that proceedings in bankruptcy were instituted and the trustee submitted his report on December 6, 1938, showing in detail disbursements made to the creditors, and no further payments were made. The complaint for reparation was filed against the partnership by the Philadelphia Produce Credit and Collection Bureau and a motion to dismiss the case was filed on the ground that respondents had been adjudicated a bankrupt; that the Secretary dismissed the proceedings on December 22, 1938 and at no time since March 1938 has a reparation award been issued against Carmen Campbell or Vincent Colace; and Vincent Colace, by discharge in bankruptcy signed May 2, 1939, was discharged of all debts and claims against the partnership.

Applicant testified that it was intended to pay for the produce purchased when outstanding accounts were collected and a witness on behalf of applicant, who was a director of the Fruit and Produce Jobbers Association in Philadelphia stated that the applicant's reputation was good, and that he had been elected unanimously as Treasurer of the Association and a member of the Board of Directors. He was still Treasurer at the time of issuance of this decision.

Ruling included in Decision

1. The record clearly disclosed that the applicant failed truly and correctly to account promptly for numerous purchases of perishable agricultural commodities. A complaint seeking reparation on behalf of numerous parties was filed but no order was issued against the applicant, for the reason he had been duly adjudicated a bankrupt. It was therefore ordered that Vincent Colace be granted a license to handle perishable agricultural commodities in interstate commerce upon payment of the prescribed fee.

S-2564, January 25, 1941, Docket 3164: (S.P.)

J. R. PAXTON, MERCEDES, TEXAS v. MARTIN UNGERLEIDER CO. INC., KANSAS CITY, MO. and WILLIAM Y BUCK, BROWNSVILLE, TEXAS.

Violation charged: Failure to pay a part of the contract purchase price for two carloads of tomatoes.

Principal points involved: Diversion of shipments constituted acceptance; common practice to divert cars to markets other than original destination; if buyer can minimize loss by diverting to another market duty rests on him to do so.

A-4
R-6
G-11
H-12

Order: Complaint dismissed.

Outline of Facts

On or about June 1, 1937, William Y Buck purchased two carloads of tomatoes, invoiced by complainant as "Standard Pack" and referred to in his wire to Ungerleider on June 1, as follows: WE SELLING MR. BUCK COUPLE CARS USONE STANDARD SIX SIXES TODAY FOR YOU UNDERSTAND HE IS TO SIGN DRAFTS COVERING SHIPMENTS WE TO BILL OPEN AND THAT YOU WILL TAKE CARE DRAFTS WITHIN WEEK AFTER SHIPMENTS MADE ***. The agreed price was \$1.15 per lug f.o.b. Texas shipping point, or a total of \$1495 for the two cars, each containing 650 lugs. Shipment was made on the same day to Kansas City, Mo., from Texas, to be handled by the two respondents on joint account. Upon arrival Ungerleider apparently found it impossible to interest buyers in the stock, largely because of the irregular size of the tomatoes, and so advised Buck by telegrams dated June 5 and 7, 1937. Thereafter the two cars were diverted to Chicago,

Illinois, where the tomatoes were sold for a net sum which was \$515.02 less than the contract price. Buck voluntarily paid the complainant one-half of the \$515.02 and complainant sought to recover the remaining \$257.51.

Both shipments were Federally inspected at Kansas City, Mo., and copies of the certificates, included in the record, showed the size as irregular.

Rulings included in Decision

1. It was clearly shown, by the original telegrams, letters and other documents contained in the record, that Ungerleider entered into a joint account agreement with Buck, who accordingly purchased the two carloads of tomatoes warranted as U.S. Standard Pack, for shipment to Kansas City, Mo.

2. U.S. Standard Pack does not permit of irregular sizing and it was therefore clearly evident that the tomatoes delivered by complainant did not meet contract specifications.

3. Diversion of the shipments by respondents from Kansas City to Chicago, Illinois constituted acceptance by them and obligated them to pay the agreed purchase price therefor, less such damage as resulted at Kansas City, Mo. from failure of complainant to ship tomatoes meeting contract requirements. In reaching a conclusion as to the destination at which the market value of the goods upon arrival should be determined, it was necessary to take into consideration the methods followed in the shipment and sale of fruits and vegetables; the duty of the one who disposed of the goods to do everything possible to minimize the loss; and the fact that there might be at the original destination no available market for the goods. It is a common practice in the fruit and vegetable trade to divert cars, after shipment, to markets other than those named in the original bills of lading, and cars may have two or three apparent destinations before the final sale is made. It is well known to shippers, as well as to receivers, that market conditions may be such that a buyer, upon arrival of a car in his market, may find it more advantageous to divert the car to another market. It is also true that in a given market goods of a certain size, quality, or condition may not be readily sold, while in some larger city, because of a greater and more varied demand, a market for these goods may exist. If there is no market available in the city in which the goods are first received and the buyer can minimize the loss by diverting them to another city, there would seem to be resting on him a duty to accomplish such diversion. The contention was made by respondent in this case, and was not disproved by the complainant, that there was no available market in Kansas City for the kind and quality of tomatoes delivered by complainant. It appeared therefore that respondent was justified in diverting

the tomatoes to a market where they could be sold. There was nothing in the record to show that sales made at Chicago failed to represent the reasonable market value for the kind and quality of tomatoes delivered. Under these conditions it did not appear that respondents should be held liable for the unpaid balance of the contract purchase price. The complaint was dismissed.

S-2565, January 28, 1941, Docket 3762: (Hearing)

Re: Application of Sam Miller, trading as Marshfield Storage Company, Marshfield, Wis., for a license under the Perishable Agricultural Commodities Act.

Principal point involved: Applicant, as president of former corporation, was responsible, in whole or in part, for violations of act which were flagrant and repeated.

Order: Application for license denied.

Outline of Facts

On October 25, 1940, there was issued a notice of hearing and order to show cause why Sam Miller, trading as Marshfield Storage Company, Marshfield, Wis., should not be denied a license under the Perishable Agricultural Commodities Act because of unfitness to engage in the business of a commission merchant, dealer, or broker. It was alleged that he had been the president of S. Miller Fruit Co. in 1933 and 1934 when that corporation refused, without reasonable cause, to account in full, or promptly, to several sellers of perishable agricultural commodities, in violation of the act, and that the corporation failed to keep proper books and records. Three orders of the Secretary in which S. Miller Fruit Company was respondent were introduced into the evidence to show violations of the act.

Mr. Miller insisted at the hearing that he was not an officer of the company during the time the violations occurred. No evidence was produced to show when or how the applicant ceased to be a responsible officer of the corporation.

Ruling included in Decision

The Articles of Incorporation of the S. Miller Fruit Co. Inc., show its incorporation in 1915, with the signature of S. Miller who was president at that time. Article 5 of its organization reads "The principal duty of the president shall be to preside at the meetings of the board of directors, and of the members of the corporation, and to have a general supervision of the affairs of the corporation." The annual report of the S. Miller Fruit Company, filed with the Secretary of the State of Wisconsin, shows that on March 15, 1935, S. Miller, of Marshfield, Wis., was the

president of the corporation. The evidence, therefore, clearly showed that Sam Miller in 1915 was president of the S. Miller Fruit Co. Inc., and was president as late as March 15, 1935. Therefore, the weight of the evidence showed that he was the president during 1933 and 1934. The applicant, as president of that company, was responsible, in whole or in part, for the violations referred to above, which were of a flagrant and repeated nature. The application of Sam Miller, trading as Marshfield Storage Company, for a license under the act was denied.

S-2566, January 28, 1941, Docket 3751: (S.P.)

C. D. DAVIS, ELMIRA, N.Y. v. JAMES S. ARMIGER & CO., BALTIMORE, MD.

Violation charged: Failure to remit net proceeds of sale of a truckload of cabbage handled on consignment.

Principal points involved: Payment in good faith to an agent having actual or apparent authority to receive payment is equivalent to payment to principal; when agent has actual possession of the goods, purchaser is warranted in paying agent.

B-8
B-16
B-3

Order: Complaint dismissed.

Outline of Facts

Complainant shipped, in a truck operated by Harold Manwaring, a truckload of 17,620 lbs. of cabbage from McLean, N.Y. to Baltimore, Md., which was delivered by Manwaring to respondent on October 28, 1939. Respondent made sale of the produce for the account of Manwaring and, after deducting a commission of \$10.31, paid to Manwaring \$118.54 by check dated October 28, which was endorsed and cashed by Manwaring. Complainant claimed that on or about October 26 he had entered into an agreement with respondent whereby the cabbage was consigned to respondent for sale for complainant's account.

Respondent denied that he was indebted to complainant in any sum whatever for the cabbage.

Ruling included in Decision

The evidence did not support complainant's contention as to the agreement with respondent. He did not inform respondent in any manner whatsoever, prior to the accounting in full to Manwaring, that the cabbage belonged to complainant, and respondent had no reason to know that complainant had an interest in it. Respondent accounted correctly and promptly for the cabbage to the person with whom the transaction was had and the complaint was therefore dismissed.

Reconsideration

Complainant petitioned for a reconsideration of the decision, claiming that there was evidence to show that the respondent knew that the complainant was the owner of the cabbage and that Manwaring was acting simply as an agent. By Secretary's order of May 21, 1941, complainant's application was granted. Two drivers of other truckloads of cabbage testified by joint affidavit that they heard Manwaring tell respondent that the load of cabbage delivered by Manwaring belonged to complainant.

Additional Rulings

1. The general rule of law is that the principal, to be bound by payment made to his agent, must by his conduct have led the buyer to believe that the agent was in fact authorized to receive payment. Payment made to an agent will not preclude recovery by his principal unless the agent's actual authority to receive payment is shown, either by proof of the principal's direction or by inferences from a course of dealing. A buyer is not justified in paying an agent merely because no notice was given him not to pay such agent. When the principal has done nothing to mislead the buyer, payment to the agent will not discharge the liability of the buyer to the principal.

2. Respondent accounted correctly and promptly for the cabbage to respondent's agent who was authorized to receive payment therefor. It was reasonable that the respondent would consider Manwaring the principal in this transaction as he had been purchasing produce from him for at least two years and had never purchased produce from Manwaring as agent or trucker for the complainant. It thus seemed probable that the respondent did not actually understand that the complainant was the owner of the cabbage; however, there is sufficient evidence in the record to indicate that the respondent reasonably should have known this fact. It may thus be concluded that the respondent had notice of the relationship existing between Manwaring and the complainant. Whether payment to Manwaring was, under the circumstances of this case, an accounting to the complainant, the established rule of law is that payment made in good faith to an agent having actual, implied, or apparent authority to receive or collect payment is equivalent to payment to the principal himself. There is no question as to the respondent's good faith in making payment to Manwaring. Whether Manwaring had authority to accept payment on behalf of the complainant, the general rule appears to be that an agent who has authority to sell or find a market for commodities has, merely by virtue of such authority, no implied authority to receive or collect payment therefor. An exception to this rule, however, occurs where the agent has actual possession of the goods sold. If the principal has entrusted the agent with the possession of the goods to be sold, the

purchaser is warranted in paying the price to the agent. It thus appears from this legal doctrine that Manwaring, because he was in possession of the cabbage and was authorized to sell it at the best terms obtainable, had authority to receive payment therefor on behalf of the complainant.

3. It was obvious that Manwaring had authority to receive payment for the complainant and that the respondent's payment to Manwaring constituted an accounting to the complainant within the purview of Section 2 of the act. Manwaring stated that, upon his return to Elmira, New York, he made an accounting to the complainant for the proceeds but "Mr. Davis refused to accept the balance due him." The complainant did not deny that Manwaring tendered him the proceeds, less the amount of Manwaring's "bill for services," but he simply set forth reasons why Manwaring was not entitled to any money for the time lost before leaving Elmira, and he states that "if there were any damages to anyone it was to me on account of the late delivery." It thus becomes obvious that the real dispute is that between the complainant and Manwaring, and that the respondent should not be made to pay again for the cabbage because the complainant has been unable to reach a settlement with his trucker. If there were no other evidence as to Manwaring's authority to receive payment with respect to this transaction, his conduct and that of the complainant following the sale would be sufficient to amount to a ratification of the trucker's act in accepting payment.

S-2572, February 1, 1941, Docket 3450: (S.P.)

S. KEMP CO., HAZELHURST, MISS. v. A.B. FRIEDMAN & CO., INC.,
ST. LOUIS, MO.

Violation charged: Failure to pay the full
f.o.b. contract price for a carload of
tomatoes.

Principal points involved: Express warranty of
suitable shipping condition met when tomatoes
graded U.S. No. 1 upon arrival at destination;
no inconsistency between above warranty and
implied warranty that tomatoes would ripen
properly; implied warranty that goods suitable
for purpose for which purchased when purpose
known to seller; loss due to latent defect
not discoverable at time of shipment on arrival
falls on shipper.

Order: Complaint dismissed.

D-4x

F-46

Outline of Facts

On June 2, 1939, by telephone, complainants sold to respondent one carload of Kemp's Pride tomatoes, mature green, U.S. No. 1, at the agreed price of \$1.10 per lug f.o.b. Hazelhurst, Miss. A carload, consisting of 625 lugs, was shipped on that date. The car arrived at St. Louis on June 4 and respondent accepted delivery. However, the tomatoes failed to ripen properly, deteriorating abnormally, and they were sold by respondent for the net amount of \$159.11, which was paid to complainants without prejudice to either party. Complainants asked for an award for the balance of the purchase price.

Respondent claimed that there was an implied warranty that the tomatoes would not unduly deteriorate before ripening; that they were infected with a latent disease which resulted in abnormal deterioration in ripening; and that respondent was entitled to damages amounting to \$251.56, representing the profit that would have been realized if they had ripened properly.

Certificate of Federal inspection at shipping point, on June 2, showed that the tomatoes were "mature green" and graded U.S. No. 1. Federal inspection at St. Louis on June 5 showed that the shipment graded U.S. No. 1, although the condition was described as "approximately 90% mature green, 10% turning, 2% decay. Decay is Bacterial Soft Rot (initial stages)." Federal inspection two days later, on June 7, restricted to condition of the produce in the accessible portion of the load, consisting of top layer lugs, showed "Approximately 55% mature green, 35% turning, 5% ripe and firm. In a few lugs no decay in most lugs from 4 to 15% average 7% decay. Decay is Bacterial Soft Rot, various stages. In most lugs from 8 to 30% in a few lugs from 50 to 80% show numerous brown to black spots on the surface."

The abnormal deterioration which seemed to take place as the tomatoes began to ripen was explained in a report of investigation of the difficulties experienced by shippers of Mississippi tomatoes during the 1939 season, which was made by two plant pathologists in the employ of the Bureau of Plant Industry, United States Department of Agriculture, a copy of which was served on each party to this proceeding. This report indicates that, because of the unusually wet weather prevailing in the Crystal Springs area, which, of course, includes Hazelhurst, there was a rapid expansion of the growing tomatoes, which resulted in growth cracks, large stem scars and cavities in the stem ends of many of the tomatoes. In addition, the fruit received scars and bruises in the harvesting and packing processes. These various injuries, which were not readily apparent while the fruit remained green, made the tomatoes highly susceptible to infection by bacteria. This bacterial infection would not ordinarily have been serious, but the warm, wet

conditions prevailing during packing and during transit were almost ideal for bacterial soft rot development. As soon as the tomatoes began to ripen, various types of rot and infection became manifest, and the fruit deteriorated abnormally.

Rulings included in Decision

1. As provided in Regulation 8, section 1, paragraphs 9 and 10 of the Regulations promulgated pursuant to the act, there was incorporated into the contract an express warranty that the shipper would ship tomatoes in suitable shipping condition which would assure delivery, under normal transportation conditions, without abnormal deterioration at destination. This express warranty was satisfied when the tomatoes arrived at destination on June 4 and were graded U.S. No. 1 on June 5. It would not have been met had the shipment remained in transit until June 7, at which time it showed abnormal deterioration.

2. It was contemplated by the parties that the tomatoes, which were sold in a mature green state, would ripen in accordance with the quality implied in the grade specification and thus be suitable for resale. Where there are no inconsistencies involved, there may be implied warranties in a contract containing express warranties. There was no inconsistency between an express warranty that mature green tomatoes will be in "suitable shipping condition," and thus will not unduly deteriorate during transit, and an implied warranty that they will ripen properly. As to whether complainants impliedly warranted that the tomatoes would ripen without abnormal deterioration the rule is well settled in both Mississippi and Missouri that where goods are purchased from a manufacturer or a producer for a specific purpose, which is known to the manufacturer or producer, there is an implied warranty that the goods will be suitable for that purpose. It is a matter of common knowledge among those familiar with the shipment of tomatoes, as is confirmed by the complainants' brief, that tomatoes are not shipped long distances in a ripened condition, as are many perishable agricultural commodities, but they are packed for shipment to distant destinations when in a so-called "mature green" state. Because they are seldom ripe enough for use upon arrival, it is customary to place them in ripening rooms at destination where they are repacked as they ripen. It may be said, therefore, that those at destination markets who buy mature green tomatoes buy them with the expectation that they will ripen properly; and those who sell them do so with the knowledge that the tomatoes must be suitable for ripening, as set forth above. Since the receivers buy, and the shippers sell, with the mutual understanding as to the way in which the tomatoes will be ripened and the quality of the tomatoes as they ripen, it may fairly be said that there is an implied warranty that the tomatoes will be suitable for these purposes.

3. Complainants failed, without reasonable cause, to deliver tomatoes to the respondent in accordance with the implied warranty in the contract. As the result of a latent defect, which could not have been discovered by any ordinary inspection, if at all, either at the time of shipment or on arrival at destination, the tomatoes failed to ripen properly, but instead, after respondent had accepted delivery and as the tomatoes began to ripen, they deteriorated abnormally. The complaint was therefore dismissed.

4. The record disclosed that respondent's counter-claim for a loss of profit of \$251.56 was not supported by adequate evidence. Respondent failed to show that it exercised due diligence in disposing of the tomatoes to avoid losses caused by a decline in the market; it failed to establish the relevance of its evidence, showing the prices of Texas tomatoes, to the evidence of the fair market price of Mississippi tomatoes; and the market price of Mississippi tomatoes, as shown by the record, was not sufficiently high to have assured the respondent of a profit if the shipment had ripened properly. The counter-complaint was therefore dismissed.

Appeal

An appeal was filed promptly by the complainant in the Federal District Court, which, on June 30, 1941, adopted the conclusions of the Department, held that since the tomatoes were unmerchantable the seller must be held for breach of implied warranty of merchantability and may not recover the purchase price, and dismissed the appeal.

S-2573, February 8, 1941, Docket 3594: (S.P.)

I.N. PRICE & CO., CINCINNATI, OHIO v. G.A. MARSH CO., ST. LOUIS, MO.

Violation charged: Failure to pay for a truck-load of green beans.

Principal point involved: The beans not having conformed to the contract, respondent was justified in selling them for the best price obtainable and tendering the net proceeds.

Order: Complaint dismissed.

Outline of Facts

On September 13, 1939, complainants offered to sell to respondent 100 or more hampers "first picking, heavy, dark green beans" at \$1.25 per hamper. On September 15, respondent wired complainants for an "early morning price delivered 300 hampers fancy green beans." The record did not disclose that complainants quoted a delivered price or that all the terms and conditions of the contract were in writing, but it did show that complainants informed respondent that refrigerator truck service could be secured for shipment from Cincinnati to St. Louis. Complainants alleged that the contract was completed by telephone, and that respondent purchased 265 hampers of green beans at \$1.10 per hamper f.o.b. Cincinnati, Ohio. Shipment was made by truck on September 16 and the truck carrier informed complainants that it could "give refrigerator service to various points, including St. Louis." On September 17, at 10:35 a.m., respondent wired complainants that the beans were "not fancy as represented" but were "small, immature to large coarse," and that the truck was "not refrigerated temperature of beans 90 heated and wilted same worthless we unloading will handle your account." Complainants alleged that respondent accepted the beans and asked for an award for the amount of the purchase price.

Respondent contended that 100 baskets of the beans were not fancy as represented and that the shipment was not made under proper protective service, that the stock was overheated in transit, and that it did not conform to warranty.

Complainants relied upon an unsworn statement of an employee of the company from which they purchased 100 hampers of the beans and upon unsworn statements by their employees as to the other 165 hampers. Respondent relied principally on Federal inspection certificate, dated September 18, 9:30 a.m., which read, in part: "Condition: An average of about 30% of stock, occurring fairly uniformly throughout all hampers, wilted, tough and dull appearing. From 5% in some hampers to 50% in others, average about 30% showing white to yellow color. Remainder fresh and firm. Less than 1/2 to 1% decay."

Rulings included in Decision

1. Although complainants omitted the word from the copy of the invoice submitted as evidence, the beans were to be fancy. They were not shown to have been fancy. In fact the inspection certificate indicated they were not.

2. Shipment was to have been made in a refrigerated truck from Cincinnati to St. Louis and, under the agreement between the parties, it was the duty of the complainants to see that the beans were so shipped. Of the 265 hampers, "165 of them were in the ice box from early in the morning." These were loaded in the truck with

100 other hampers which had been purchased by the complainants to apply on the contract. The loading of the beans was not completed until the late afternoon of September 16, 1939. They were loaded in a truck. The truck was not refrigerated, but did contain two oil drums in which ice had been placed. If the two drums had been full of ice at shipping point, this would not have furnished suitable or sufficient refrigeration for this shipment.

3. The beans not having conformed to the contract of purchase and sale, respondent was justified in selling them for the best price obtainable, after promptly informing complainants in regard thereto and in tendering the net proceeds in the sum of \$80.10 to the complainants. It was therefore ordered that the case be dismissed provided respondent again tender the net proceeds, after deducting transportation charges, or \$27.63, to the complainants.

S-2574, February 8, 1941, Docket 3647: (S.P.)

FRESH FOODS CO., CHICAGO, ILL. v. O.J. BARNES CO., EAST GRAND FORKS, MINN. and/or FISHER BROS. CO., CLEVELAND, OHIO.

Violation charged: Failure to deliver in accordance with contract by Barnes or unjustified rejection by Fisher.

Principal points involved: Diversion of car by buyer constituted acceptance; potatoes "fairly clean" are not clean; Federal inspection certificates entitled to greater weight than statements of respondent and witnesses; complaint alleged alternative violation, either by shipper or by buyer.

Order: Complainant awarded \$168.30, plus interest against O.J. Barnes Co.; complaint dismissed as to Fisher Bros. Co.

A-4
D-4q
N-12
N-13
C-17

Outline of Facts

On or about September 13, 1939, O.J. Barnes Co. sold to complainant a carload of 360 sacks of U.S. No. 1 Cobbler potatoes at \$1 per 100-lb. sack, f.o.b., which were warranted to be "good size, good color and clean." Shipment was made from Kellogg, N. D., to Chicago, Ill., and the potatoes were resold by complainant to Fisher Bros. Co. at Cleveland, Ohio, with a warranty substantially the same as made by Barnes. Upon arrival at Cleveland, Fisher Bros. rejected the shipment and it was then diverted to and resold at Pittsburgh, Pa. for net proceeds which amounted to \$168.30 less than the original contract price, for which amount complainant asked an award, contending that either the potatoes did not meet contract specifications or else they were unjustifiably rejected.

O.J. Barnes Co. in its answer alleged that the potatoes did meet contract specifications, and contended that diversion from Chicago constituted acceptance by complainant "without recourse." Fisher Bros. denied liability for the reason that the potatoes did not conform to the contract of purchase and sale.

Federal-State inspection certificate issued at shipping point on September 12, stated "Stock fairly well matured, firm smooth and generally fairly clean." Federal inspection certificate issued at Cleveland, Ohio, dated September 18, stated "Quality: Fairly well matured, slightly skinned, fairly clean to slightly dirty, slightly dull to dull. Generally well shaped. Grade defects within tolerance."

Findings included in Decision

1. O.J. Barnes Co.'s contention that the diversion from Chicago to Cleveland constituted acceptance was correct, but it did not follow that complainant was obliged to pay Barnes for the full purchase price if the potatoes did not conform to the specifications of the contract.

2. The potatoes purchased by complainant from O.J. Barnes Co. did not conform to the specifications of the contract of purchase and sale. They were to be clean, and potatoes which are "fairly clean" or "fairly clean to slightly dirty" are not clean. The findings of the official inspectors contained in the inspection certificate were entitled to greater weight than the statements of Barnes and his deposition witnesses that the potatoes were clean or cleaner than the average.

3. Complainant endeavored to sell the potatoes in Cleveland to Fisher Bros. upon representations as to quality and condition similar to the specifications of the contract with Barnes. The evidence indicated that Fisher Bros. would have accepted them had they conformed to the contract, and that they were sold for the best price obtainable in Pittsburgh. Complainant was awarded \$168.30, plus interest against O.J. Barnes Co.

4. Fisher Bros. Co. did not reject the potatoes without reasonable cause and the complaint against them was therefore dismissed.

S-2577, February 8, 1941, Docket 3657: (S.P.)

MICHAEL DIAMOND, NEW YORK, N.Y. v. BEN KARDONSKY, FORT LAUDERDALE, FLA.

Violation charged: Failure to deliver a carload and a truckload of beans in compliance with contract.

Principal point involved: Inferiority of beans so evident that it must be said respondent falsely misrepresented the beans for fraudulent purpose of obtaining brokerage fees in violation of section 2.

Order: Complainant awarded \$128.55, plus interest; respondent's counterclaim dismissed.

Outline of Facts

On December 22, 1939, Ben Kardonsky wired Michael Diamond "can load today tomorrow fancy car Bountiful dollar or less ***." Diamond replied "IF BEANS EXTRA FANCY FIRST PICKING BUY ME CAR OR TWO FOR DOLLAR OR LESS ADVISE IMMEDIATELY." Kardonsky answered during the same day "PURCHASED FOR YOU AN ORDER OUT TONITE (car number) CONTAINS 59 BOUNTIFUL COST 1.25. 337 COST 1.00. 81 COST 90. CENTS. 123 COST 85 CENTS. 42 CONSIGNED FROM BLOUNT BROS. WIRE \$632.42 INCLUDES LOADING LABELING PLUS BROKERAGE. OR HAVE YOUR BANK WIRE GUARANTEE PAYMENT DRAFT LADING ATTACHED TO MY BANK BARNETT NATIONAL BANK FORT LAUDERDALE FLORIDA. MARKET WOUND UP STRONG ALL MARKETS GOOD. HAD TO PAY 1.25 FOR 59 GET LOW RATE ON CAR. IF YOU WANT CAR TOMORROW GUESS HAVE TO PAY 1.35 or 1.50. ADVISE EARLY THANKS REGARDS. MUST PAY CASH TO GROWERS. ***"

On the following day Diamond wired Kardonsky "INTERESTED IN CAR EXTRA FANCY FIRST PICKING BOUNTIFULS AT DOLLAR OR LESS ***"

Kardonsky replied "PURCHASED FOR YOU ON ORDER 103 BOUNTIFUL AT DOLLAR. SHIPPED BY TRUCK AS UNABLE LOAD CAR AS MARKET WOUND UP STRONG AS TOLD YOU YESTERDAY. PAY DRIVER 45 CENTS. ***" The beans were shipped from Florida, and before arrival at New York City complainant paid Kardonsky his commission, costs of loading and the sum of the prices paid by Kardonsky for the beans which were shipped by rail. On December 26 Diamond wired Kardonsky that the beans were not what he ordered and complaint was filed for recovery of \$270 on the basis of the following: "The difference between the sale price of these beans and the average market price showed a loss of 59¢ a basket; 600 baskets in the carload times 59¢ equals \$354. On the truckload the loss amounted to \$24 which totals \$378. I am holding \$108 on the truckload which deducted from \$378 leaves \$270 which I am asking from Mr. Kardonsky."

Certificate of Binney inspection on December 26 of a portion of the beans shipped in the car showed that the stock failed to meet U.S. No. 1 grade factors account excess tolerance for poorly formed and small prematurely picked or undeveloped pods. "Stock free from soil, some hampers show occasional leaf mixed with the beans. 151 lot. Average 4% old, tough and pale, balance very irregular ranging from very small and undeveloped to few large. Irregular shaped, many poorly formed. 2 to 5% moderately heavy scars, many light scars or blemishes. Fair to some medium quality. 88 lot. Range 2 to 7% old, tough and pale. 2 to 6% moderate heavy scars. Otherwise same as 151 lot. 81 lot. Range 1 to 4% old, tough and pale. 3 to 7% moderately heavy scars. Most of balance dull appearing with light scars or blemishes. Packs faced with medium large well formed beans, balance mostly small to medium small, poorly to only fairly well formed. Ordinary to fair quality. 123 lot. Range 3 to 8% old, tough and pale. Very irregular in shape and size. Packs faced with well formed stock, balance mostly small and poorly to only fairly well formed. Ordinary to fair quality."

Rulings included in Decision

1. Complainant contracted to accept and respondent to purchase for complainant one or two carloads of extra fancy, first picking Bountiful beans.

2. It was clearly evident that the beans were not extra fancy, or fancy, or even U.S. No. 1. The beans contained in the car were so inferior to those specified in the agreement between the parties that Kardonsky as a dealer and broker in fruits and vegetables must have known of their inferiority. He induced Diamond, however, to place an order with him for fancy beans, and pay for the carload before it arrived at destination. Under these conditions, it must be said that Kardonsky falsely misrepresented the beans for the fraudulent purpose of obtaining his brokerage fees, in violation of section 2 of the act. Since the carload of beans delivered by the respondent did not meet the contract requirements and was paid for in full by the complainant, at the contract price, the latter was entitled to recover his actual loss in the amount of \$128.55, which represented the difference between the out-of-pocket loss of \$236.70 (inspection charge of \$2 could not be allowed) on the carload of beans and the \$108.15 which the complainant owed respondent for the truck shipment, which was not shown to be of inferior quality. Complainant was awarded \$128.55, plus interest.

S-2582, February 27, 1941, Docket 3607: (Hearing)

R.E. ADAMS MARKETING CO., MOORESTOWN, N.J. v. WILLIAM H. KOPKE, JR.,
NEW YORK, N.Y.

Violation charged: Failure to accept four carloads of apples.

Principal point involved: Complainant failed to show, by a preponderance of the evidence, that the rejection was without reasonable cause or what, if any, damages were sustained.

Order: Complaint dismissed.

Outline of Facts

On or about July 22, 1939, contemplating shipment of the commodity in interstate commerce, complainant sold to respondent, on a basis of delivery at New York, four cars of U.S. No. 1 Jonathan apples of specified sizes and brands, one at 90¢ per box, two at \$1.10 per box, and one at 90¢ per box for 2" - 2 $\frac{1}{4}$ " size and \$1.10 per box for the 2 $\frac{1}{4}$ " - 2 $\frac{1}{2}$ " size. Respondent maintained that the complainant knew the apples were purchased for export and alleged that the subsequent state of war between Germany and France and England, in September, 1939, made it impossible for him to carry out the contract and accept the fruit. Complainant consigned the apples to a London firm and claimed that resale netted him \$1638.72, or \$964.78 less than the amount for which the apples were sold to respondent, and asked for an award in that amount.

Ruling included in Decision

Complainant failed to show, by a preponderance of evidence, that the apples were rejected without reasonable cause, or what, if any, damages he sustained. The burden of proof was upon complainant to establish the material allegations in the complaint by a fair preponderance. He was duly notified as to the time and place of hearing, but did not appear because he was "too busy." His wife entered her appearance and was the only witness who testified on behalf of the complainant. Her attention was directed by the examiner to paragraph 3 of the complaint, wherein it was alleged that respondent purchased four carloads of apples, and to paragraphs 5 and 6, where reference was made to five carloads and two truckloads of apples. Her explanation was to the effect that the four carloads "were shipped right along with the apples that were going to Sims at that time." The greater part, if not all, of the testimony of Mrs. Adams was hearsay. Jonathan apples are usually perishable and should be shipped to England under refrigeration. Only one of the four carloads was so shipped. The complainant relied solely on the six accounts sales from J.C. Sims, Ltd., London, England, to establish the damages claimed.

Those accounts sales were dated from October 13 to November 1, 1939. Four of them contained the words "Guaranteed Advance," an admitted error, and showed the apples were shipped on four different boats and not three, as stated by Mrs. Adams. Five of the accounts sales read, in part: "(Barr's Account) Proportionate." Only one showed a car number. None showed the date of sale of any of the apples. The complaint was dismissed.

S-2590, March 8, 1941, Docket 3744: (S.P.)

JOHN S. BARNES, INC., PLANT CITY, FLA. v. SHREVEPORT BROKERAGE CO., SHREVEPORT, LA.

Violation charged: Failure to pay for a truckload of tomatoes.

Principal point involved: Failure to pay the purchase price was in violation of the act.

Order: Complainant awarded \$518, plus interest.

Outline of Facts

On or about May 18, 1940, complainant sold to respondent 330 lugs of tomatoes of different sizes at agreed unit prices per lug, for the aggregate price of \$518. The tomatoes were shipped by truck from Palmetto, Fla. to Shreveport, La., at which last named point respondent accepted them but thereafter failed and refused to pay complainant the agreed purchase price. Complainant asked for an award of \$518.

A copy of the complaint was served on respondent on October 15, 1940, but he failed to file an answer.

Rulings included in Decision

1. Respondent's failure to answer the complaint made the verified complaint usable both as a pleading and as proof of the facts therein stated.

2. Respondent's failure to pay complainant for the tomatoes was in violation of section 2 of the act. Complainant was awarded \$518, plus interest.

S-2594, March 8, 1941, Docket 3611: (Hearing)

R. U. LECATO, AGENT, PAINTER, VA. v. PHILLIPS BROS., SALISBURY, MD.

Violation charged: Unjustified rejection of three truckloads of tomatoes.

Principal point involved: Testimony of drivers of trucks had greater weight than that of plant's witnesses who dealt with numerous loads day after day at the plant.

Order: Complaint dismissed.

Outline of Facts

Complainant claimed that on or about August 22, 1939, by telephone, he agreed to sell to respondents five truckloads of tomatoes at 18¢ per basket, to be delivered on August 22 or 23, subject to inspection by respondents at their plant in Salisbury, Md.; that two of the truckloads were delivered on August 22 and were accepted; that the other three truckloads arrived at the plant on the afternoon of August 23 and while standing in the truck line at the plant were inspected and accepted by respondents' employee, who stated that the goods would be unloaded the following morning; that when the plant opened the next morning the drivers were informed that the tomatoes, because of excessive deterioration, could not be unloaded and should be removed from the yard; that after several efforts during the day to make resale two truckloads were dumped and the third sold for \$14.84; and that complainant was entitled to damages by reason of the rejection. In support of his contention that the three truckloads were inspected and accepted, drivers of two of the trucks testified that on arrival at the plant the three trucks were placed in the truck line, which extended from the scalders within the yards, where the trucks were unloaded, through the yard and into the street; and that a man who they believed to be a representative of respondents, cursorily inspected their loads by climbing on top and looking through the side slats of the trucks and represented to them that the tomatoes were being accepted by respondents on condition that the truck line progressed sufficiently to bring the trucks within the yard by closing time. On cross-examination, one of these witnesses agreed that the man's statement was not more explicit than "If we get you up here in the yard, we will look at them in the morning" and the other that the statement to him was "We are kind of rushed up there. If I can get you through, I will take care of you in the morning."

Respondents claimed no contract was entered into on August 22; that the only inspections made in the line were for the purpose of selecting trucks for immediate unloading, or for rejecting tomatoes clearly unsuitable for use at the plant, the custom being to inspect and pass on each basket taken from a truck when it reached the scalding; that the practice of attempting to get trucks within the yard before closing time and allowing them to remain there over night was initiated to meet an objection of the City Police to the truck line remaining extended into the street during the night.

Rulings included in Decision

1. The equal division of the weight of the testimony by complainant and respondents would, in itself, be sufficient to preclude a finding that the contract existed; but there were other matters in the record which greatly minimized, if not completely destroyed, the weight of the complainant's testimony. That is, the complainant, after testifying that he and the respondents had no dealings during the period involved other than those contemplated under the five-truckload contract, and that only two truckloads were accepted and accounted for by the respondents, could not explain the exhibits of the respondents, including a paid check endorsed by the complainant, showing the receipt of three truckloads of tomatoes from the complainant on August 22 and 23, and full payment for them by the respondents. This inconsistency was a serious reflection on the complainant's memory of the circumstances of the transaction. The fact that the complainant contended that there were three truckloads of tomatoes involved in the alleged unlawful rejection, while other facts showed that only two could possibly have been involved, was an indication that the complainant was offering tomatoes by placing them in line at the respondents' plant rather than making delivery by placing them there pursuant to the provisions of an executory contract.

2. The respondents did not accept the tomatoes offered. This conclusion was not reached on the ground that the custom of the respondents was to accept only at the time of unloading at the scalding, for the use of sufficiently definite words, or the commission of specific acts by the respondents, could constitute an intentional deviation from the customary procedure and would be held to be an acceptance. Nor was the conclusion based on the finding that a representative of the respondents did not make any inspection of the goods and remark to the drivers concerning the unloading of the goods on the following morning, for the testimony of the complainant's witnesses in this regard was more creditable than that of the witnesses for the respondents. The drivers of the trucks had more reason and ability to remember what happened with respect to one of their very infrequent trips to the plant than had the respondents' witnesses who dealt with

numerous loads day after day at the plant. The conclusion, adverse to the complainant, was based on the ground that the words reported by the drivers to have been used by the inspector were not sufficient to convey the meaning that the goods were accepted. The complaint was therefore dismissed.

S-2601, March 8, 1941, Docket 3806: (S.P.)

PACIFIC COAST FRUIT DISTRIBUTORS, INC., LOS ANGELES, CALIF.
v. SHREVEPORT BROKERAGE CO., SHREVEPORT, LA.

Violation charged: Failure to pay the full contract purchase price for a carload of grapes.

Principal point involved: No answer having been filed verified complaint accepted as proof of facts.

Order: Complainant awarded \$252.14, plus interest.

Outline of Facts

On or about July 25, 1940, respondent purchased from complainant a carload of grapes, 1018 lugs of Thompson Seedless at \$1.17 $\frac{1}{2}$ and 116 lugs of White Malagas at \$1.30 per lug, or for \$737.14 delivered Alexandria, La. Shipment was made on July 23, 1940, from California to Shreveport and Alexandria, La. Respondent accepted the shipment and paid the sum of \$485 on the purchase price, and complainant asked for an award of \$252.14.

A copy of the complaint was served on respondent on December 9, 1940, but no answer was filed.

Ruling included in Decision

Since respondent failed to answer, the verified complaint was accepted as proof of the facts therein alleged, and complainant was awarded \$252.14, plus interest.

S-2602, March 8, 1941, Docket 3816: (S.P.)

J.E. BELL CO., STOCKTON, CALIF. v. SHREVEPORT BROKERAGE CO.,
SHREVEPORT, LA.

Violation charged: Failure to remit the purchase price of a carload of potatoes.

Principal point involved: Failure to account for net proceeds is violation of section 2 of act.

Order: Complainant awarded \$417.75, plus interest.

Outline of Facts

On or about June 14, 1940, complainant contracted to sell to respondent 300 sacks of U.S. No. 1, size A, washed Long White potatoes, at the agreed price of \$2.20 per 100-pound sack, delivered Shreveport, La., after partial unloading in transit at Marshall, Texas, the total net price after deduction of freight being \$432.75. The shipment was to be billed to respondent, as a broker, who was to be responsible for delivery to the purchasers secured by him, whose names he did not disclose, and for collection of the purchase price, less a brokerage fee of \$15. Shipment was made on June 14, 1940 from Shafter, California, billed to respondent at Shreveport, with orders to the carrier to stop the car at Marshall, Texas, for partial unloading. Respondent accepted delivery but failed to remit \$432.75, less \$15, or \$417.75 to complainant for which amount an award was requested.

A copy of the complaint was served on respondent on December 16, 1940, but no answer was filed.

Ruling included in Decision

Respondent failed, in violation of section 2, to account to the complainant for any part of the net proceeds of the potatoes. Complainant was therefore awarded \$417.75, plus interest.

S-2606, March 21, 1941, Docket 3465: (Hearing)

A. B. FRIEDMAN & CO., ST. LOUIS, MO. v. JAMES TOZZI & CO., STOCKTON, CALIF.

Violation charged: Failure to deliver a carload of grapes in compliance with contract specifications.

Principal point involved: Burden of proof on complainant (buyer) to establish lack of suitable shipping condition.

Order: Complaint dismissed.

Outline of Facts

On or about November 2, 1938, through a broker, respondent sold to complainant a carload of U.S. No. 1 table grapes, shipped from Modesto, Calif., on October 22, and then in transit, for the sum of \$935 f.o.b. shipping point. The car arrived at St. Louis, Mo., November 5. Complainant admitted the grapes were apparently in good condition when doorway inspection was made on November 5, but claimed that on reinspection on November 9, considerable decay and mold was found and Government inspection made that day showed "in most lugs 5 to 25%, mostly 10 to 15% decay and mold"; that this condition was due to the inherent nature of the grapes and was caused by rain or some other unusual growing condition; that the grapes were sold at auction on November 10 for prices ranging from 35 to 40¢ per lug delivered, resulting

in a deficit of \$207.50; that the car should have had a value of \$1540, or \$1143.70 more than the net proceeds, which amount was claimed as damages.

Respondent denied that inferior grapes were applied to the contract, and stated that inspection at Modesto showed them to be U.S. No. 1 and that grapes shipped at the same time from the same vineyard were sold at auction on November 7 in Minneapolis, Minn., for \$1.32 per lug. The grower and owner of the grapes, for whom respondent handled them, testified that the grapes were picked four or five days after a .17 inch rain on October 15 and a .03 inch rain on October 16, and that the rain mentioned would have had no effect on them; and that the grapes were gassed with SO_2 gas, which would eliminate mold and decay.

Ruling included in Decision

A consideration of the evidence as a whole indicated that the grapes were in suitable shipping condition, although it did not disclose directly that this was a fact at the time of sale on November 2, ten days after shipment. The shipping point inspection certificate, dated October 22, showed an average of one-half of 1% decay, but the grapes were graded U.S. No. 1 Table. The car was shipped standard refrigeration. The inspections of the complainant on Saturday and Sunday, November 5 and 6, after arrival, led to the conclusion that the grapes were in suitable shipping condition at time of sale. This was not overcome by the condition disclosed by Government inspection on November 9. The explanation of the respondent, attributing the deterioration to the opening of the car on November 5 and 6, and the standing on track until November 9, was more acceptable than that their condition was caused by rains at Modesto, or 60 hours consumed in loading. This contention of the respondent, was supported to some extent by evidence of the shipment of other cars from the same vineyard within ten days thereafter, and the arrival of those shipments in good condition in eastern markets. There was no evidence as to inherent defects. The burden of proof rested on the complainant to establish lack of suitable shipping condition. The complaint was therefore dismissed.

S-2614, March 25, 1941, Docket 3696: (S.P.)

ROSEMARY PACKING CO., LOS ANGELES, CALIF. v. ST. LOUIS
DISTRIBUTING CO. INC. and/or M. CORNFIELD & CO., BOTH OF
ST. LOUIS, MO.

Violation charged: Failure to pay for a carload of celery.

B-8

M-14

M-21

Principal point involved: "Collect and remit" did not mean "collect and deliver" and did not make broker responsible for collection of contract purchase price.

Order: Complainant awarded \$286.90, plus interest against M. Cornfield & Co.; dismissed as to St. Louis Distributing Co. Inc.

Outline of Facts

On or about January 9, 1940, complainant shipped a carload of 342 crates of celery from Santa Maria, Calif., consigned to itself at Chicago, Ill. Thereafter various telegrams were exchanged by complainant and the St. Louis Distributing Co. Inc., the broker, concerning sale of the car, and on January 16 the broker wired complainant to the effect that the entire trade had been canvassed and Cornfield had made the best offer of \$2.15 per crate delivered. Complainant replied during the same day "CONFIRM *** 2.15 DELIVERED COLLECT AND REMIT ***." The shipment in the meantime had been diverted by complainant to itself at St. Louis and on January 16, the date of the sale, it was diverted from itself at St. Louis to the St. Louis Distributing Co. It arrived at St. Louis on January 17 and Cornfield accepted delivery in accordance with the customs and practices of the produce trade at that market, providing that payment would be made on the following Thursday, January 25, but he informed the broker on that date that he did not have sufficient cash to pay for the celery, and on the following day made an assignment for the benefit of creditors. The assignee afterward paid \$80.70 to the broker, which, in turn, was remitted to the complainant, thus reducing complainant's claim to \$286.09, for the recovery of which complaint was filed against the broker and/or the purchaser.

The St. Louis Distributing Co. alleged that it acted only as broker and made the sale to a supposedly reliable purchaser, without in any way guaranteeing payment for the celery.

Rulings included in Decision

1. The St. Louis Distributing Co. Inc. acted only as broker in the transaction, and disclosed to complainant the name of the purchaser, who appeared to be solvent and whose credit was not guaranteed to the complainant by the broker. The decision rested upon whether the complainant released the shipment to the broker in such manner as to make this respondent responsible for the collection of the full amount of the contract purchase price of the celery. Had complainant's instructions read "collect and deliver," there would be great merit to its contention. An instruction to "collect and remit" could not be interpreted to mean "collect and deliver." Careful consideration of the exchange of communications, quoted in the decision, led to the conclusion that the complainant had sold many other carloads of produce on the St. Louis market, and, therefore, must have known of the credit customs in that market, where the respondent Cornfield was, apparently, regarded as a safe risk. The complaint was therefore dismissed as to St. Louis Distributing Co. Inc.

2. Complainant was awarded \$296.09 plus interest against M. Cornfield & Co.

S-2621, April 2, 1941, Docket 3683: (Hearing)

Re: Application of O.F.E. Winberg, of Silver Hill and Loxley, Alabama, for a license under the Perishable Agricultural Commodities Act.

Principal point involved: By failing to pay the amount due a grower, the applicant violated the act and engaged in a practice prohibited by the act.

Order: O.F.E. Winberg's application for license denied.

Outline of Facts

On April 29, 1940, O.F.E. Winberg applied for a license under the Perishable Agricultural Commodities Act. On July 31, 1940 there was issued a notice of hearing and order to show cause why applicant should not be denied a license because of unfitness to engage in business, it being alleged: (1) that he had been connected in a responsible capacity, as president, of Winberg Orchards & Nurseries Co. Inc., Satsuma Cooperative Corporation, Gulf Coast Citrus Exchange, and Ozona Citrus Growers Association, which, within two years were found guilty of violations of the act; and (2) that he engaged in a practice of the character prohibited by the act in that in November and December 1939

Mrs. Catherine Elkins, of St. Elmo, Alabama, delivered to him for sale, in interstate commerce, on consignment, 3439 bushels of Satsuma oranges; that they were sold for the gross sum of \$5042.10, with legitimate expenses of \$1668, leaving a balance due the grower of \$3373.26 and that the applicant failed truly and correctly to account promptly to the grower, having paid not over \$1600 of the \$3373.26 which was due.

Mr. Winberg failed to appear at the hearing, either in person or by attorney. Opportunity was afforded counsel on both sides to submit briefs and suggested findings of fact. Counsel for the Government submitted suggested findings which were considered.

Ruling included in Decision

By failing to pay truly, correctly and promptly the amount due the abovenamed grower, the applicant violated the act and engaged in a practice of the character prohibited by the act. His application for a license was denied.

S-2622, April 4, 1941, Docket 3677: (S.P.)

DAVIS BROS., CHICAGO, ILL. v. THE CAVALIER-GULLING-WILSON CO., CLEVELAND, OHIO.

Violation charged: Failure to deliver a carload of apples in accordance with contract.

Principal point involved: Complainant failed to prove compliance with contract requirements, resulting in dismissal of complaint.

Order: Complaint dismissed; respondent awarded \$11, plus interest.

Outline of Facts

After preliminary negotiations between the parties on February 28, 1940, respondent offered to complainant "U.S. 1 2 $\frac{1}{4}$ " Jonathans 90 f.o.b. Cleveland acceptance" and later that day complainant wired "CONFIRMING PHONE CONVERSATION TODAY WITH WILSON OF OUR ACCEPTANCE CAR JONATHANS QUOTED SUBJECT OUR APPROVAL SAMPLE IF SATISFACTORY WE ACCEPT 90 $\frac{1}{4}$ FOB CLEVELAND." Respondent immediately replied "CONFIRM ONE CAR USONE 2-1/4 JOHNS NINETY FOB CLEVELAND SUBJECT APPROVAL SAMPLE TERMS CASH CLEVELAND BEFORE SHIPMENT." Respondent shipped, by express, a sample of 10 boxes of 2 $\frac{1}{8}$ " Jonathans to complainant, at a charge of \$9 for the apples and \$2 cartage, or \$11 f.o.b. Cleveland. On the 29th complainant wired respondent "SAMPLES HERE. WE ACCEPT CAR AS PER SAMPLE. WILL ADVISE LATER DAY WHEN LOAD. **" and respondent replied "OKAY. WILL AWAIT

LOADING ADVISE ONLY CAR WE HAVE MUST HAVE \$485.20 CASH HERE BY 7:00 A.M. TOMORROW COVER 538 BOXES 90 PER OTHERWISE WILL NOT HOLD ***". Complainant ordered the apples to be loaded on the 30th and had a bank guarantee payment of draft, but respondent wired "BANK GUARANTEE NOT SATISFACTORY WILSON TOLD YOU CASH HERE BEFORE LOADING. NOT LOADING UNTIL GET WESTERN UNION MONEY ORDER." Complainant sought to collect damages because of respondent's failure to ship the apples.

Respondent filed an answer denying the material allegations of the complaint and setting up a countercomplaint alleging that complainant failed to account to respondent for the agreed value of the sample lot of apples shipped to complainant.

Rulings included in Decision

1. Complainant contracted to purchase and respondent to sell a carload of 538 boxes of U.S. No. 1 Jonathan apples, 2 $\frac{1}{4}$ " and up, at the agreed cash price of \$484.20 f.o.b. at Cleveland.

2. Complainant failed to prove respondent agreed to accept a bank guarantee, or that complainant complied with the contract requirements, providing for cash payment before respondent would ship the apples, by the tender of a cashier's check or cash to the respondent in payment for the fruit.

3. Complainant accepted delivery of the sample lot of 10 boxes of Jonathan apples which was invoiced to him at \$11, and made no complaint concerning the sample, but failed to pay for it. Respondent was therefore awarded \$11, plus interest.

S-2633, April 28, 1941, Docket 3769: (S.P.)

CONNER & COMPANY, PHILADELPHIA, PA. v S.B. VERNEKOFF, PHILADELPHIA, PA.

Violation charged: Failure to pay the full purchase price of 160 bags and unjustified rejection of 190 bags of potatoes.

Principal point involved: Since "U.S. No. 2" was stamped on sacks and potatoes were invoiced as U.S. No. 2, the manner of sale amounted to a warranty as to grade.

Order: Complaint dismissed.

Outline of Facts

On May 3, 1940, a carload of potatoes was shipped to complainant from Limestone, Maine, for sale on consignment. Complainant unloaded the potatoes and placed them on the Pennsylvania Produce Terminal Platform, where they were located on May 7, when respondent purchased 350 bags at \$1.70 per cwt., or \$595 f.o.b. the platform. Complainant claimed that the purchase was made after inspection and respondent did not definitely deny this but he contended that he relied to a considerable extent on the statement alleged to have been made by the Federal-State inspector at Limestone that the potatoes were U.S. No. 2. Respondent took delivery of 160 bags and paid \$1.50 per bag, or \$240 for them, which was \$32 less than the alleged agreed price for the lot, and failed to take delivery of the remaining 190 bags, which were thereafter sold by complainant for \$1.40 per bag, or \$266, or at a loss of \$57. Complainant asked for an award of \$32 plus \$57, or \$89.

Certificate of Federal inspection at Philadelphia on May 10, of the lot then remaining, stated: "Green Mountain type Potatoes in burlap sacks branded 'Grade U.S. No. 2, Maine potatoes, Red Eagle Brand, Aroostook Grown Potatoes, F.O. Simonson, Limestone, Me., 100 lbs. net.' Approximately 180 sacks remaining." This certificate showed that the "Stock fails to grade U.S. No. 2 due to defects in excess of tolerance," and "Stock is fairly clean and fairly bright; 15 to 30%, averaging approximately 20% defects of U.S. Grade No. 2, consisting mostly of serious shatter bruises."

Rulings included in Decision

1. Complainant offered the potatoes in such a manner as to constitute a warranty that they were U.S. No. 2 grade. Although they were apparently available for inspection by prospective buyers there was no showing what, if any, examination may have been made by respondent, who saw, and claimed to have relied largely upon the brand "U.S. No. 2" which was stamped on the sacks, and on the purported statement of Federal shipping point inspection which was affixed to the lot to show that the potatoes were U.S. No. 2. In addition complainant in his invoice and in the complaint filed in this case referred to the sale of U.S. No. 2 potatoes.

2. Although the bags were branded "U.S. No. 2," the potatoes failed to meet the requirements of that grade because of defects, which, from their nature, must have been present at the time the potatoes were purchased by the respondent. The complaint was therefore dismissed.

S-2637, May 7, 1941, Docket 3456: (S.P.)

GUADALUPE PRODUCE CO., GUADALUPE, CALIF. v. LERNER FRUIT & PRODUCE CO. and BALDWIN-POPE MARKETING CO., ST. LOUIS, MO.

Violation charged: Failure to pay for a carload of carrots.

Principal points involved: Agent for undisclosed principal may set up any defense
B-1 available to principal; commission
B-11 merchant not liable to shipper when
N-9 purchaser fails to pay for goods found
D-12 unmerchantable and he not a del credere agent; sale by description involves implied warranty that goods will be merchantable.

Order: Complaint dismissed.

Outline of Facts

On August 16, 1938, complainants shipped a carload of 348 L. A. crates of bunched carrots from Guadalupe, California to the Lerner Fruit & Produce Co., St. Louis, Mo., to be sold by it for complainants' account. On August 26, while the car was on track at St. Louis, after securing doorway inspection, Baldwin-Pope Marketing Co. purchased the carrots on the basis of inspection and acceptance at St. Louis, at \$2.85 per crate delivered Philadelphia, Pa., or for invoice price of \$991.80 less estimated freight and top icing charges of \$494.39, leaving a net price of \$497.41. This purchase was made as agent for Lewis D. Goldstein Co. Inc., but the name of the principal was not disclosed. The invoice, to which Baldwin-Pope added \$25 brokerage, was submitted to Goldstein. The shipment was diverted and Goldstein was notified of arrival at Philadelphia at 4:00 a.m. August 29. On August 30, he protested to Baldwin-Pope as to quality and condition, and the latter advised Lerner, who in turn notified complainants. Goldstein accepted the shipment and disposed of 292 crates for the gross amount of \$383, which was \$157.29 less than the freight and incidental charges incurred. 55 crates were rejected to the carrier and the shipment was one crate short. Goldstein paid no part of the invoice price to Baldwin-Pope and the latter failed to pay any part to Lerner, or to the complainants, who asked for an award of \$497.41.

Baldwin-Pope claimed that only the doorway crates were accessible for inspection at St. Louis and that Federal inspection at Philadelphia two days after arrival showed that the portion of the lading which was inaccessible was decidedly inferior to that in the doorway.

Apparently based on the fact that about 11 months after arrival of the shipment Goldstein filed a claim with the carrier for damage based on shifting of the load and defective and leaky plugs, complainants claimed that inasmuch as the shipment was under the exclusive control of the purchaser after acceptance at St. Louis, the damage must have resulted from abnormal handling and defective equipment subsequent to acceptance. This claim was not considered on its merits but was declined by the carrier because not filed within the statutory period of limitations provided under the Interstate Commerce Act.

Federal inspection at Philadelphia on August 31 showed: "Roots generally firm. In most samples, no decay on roots; many show 1% to 8%, averaging 2% for the lot, consisting mostly of Watery Soft Rot in early stages. In most crates most tops are yellow or badly watersoaked, some show Bacterial Soft Rot in various stages; some crates, located mainly between doors, show most tops fresh and green, some turning yellow or brown. New roots noted with short growth of new rootlets."

Rulings included in Decision

1. Lerner Fruit & Produce Co. acted in the capacity of a commission merchant or distributors for complainants inasmuch as possession of the goods, together with implied authority to make sale and collect the price without consulting complainants, seems to have been reposed in it. Since it was not shown that the company acted as del credere agent and complainants were promptly and fully advised of all details regarding the transaction, there seemed to be no liability of this respondent to complainants and the complaint was dismissed as to it.

2. The filing of a claim alleging that defective and leaky plugs, among other things, caused the damage to the shipment led to an inference that the equipment may have been defective. There was, however, no definite evidence of record to show that the car contained defective and leaky plugs on arrival at Philadelphia. It was reasonable to assume that, if the plugs were leaky and defective on arrival of the car there, a similar situation prevailed during the entire period of transit from the shipping point; yet it appeared that the effect of such defect was not noticeable, nor was the condition apparent at St. Louis seven days after shipment. Furthermore, Federal inspectors are instructed to show instances of defective equipment on the certificates issued by them, yet the certificate in question made no mention of leaky plugs.

3. As an agent for an undisclosed principal, Baldwin-Pope might set up against complainants any defense available to its principal. The Uniform Sales Act provides that, where goods are bought by description from a seller who deals in goods of that description, there is an implied warranty that they will be of merchantable quality. It is generally recognized that it is physically impossible to make more than a doorway inspection in a car of carrots packed in L. A. crates, loaded four high on the sides of the crates, stripped and covered with crushed top ice, without unloading. The inspection certificate referred to showed that the condition of the carrots in the ends of the car away from the doors was markedly inferior to that in and near the doors. Furthermore, the badly watersoaked condition of the tops shown by this inspection indicated a strong probability that much of this deterioration was present and that it would have been evident had there been full opportunity for inspection of this portion of the shipment at St. Louis. Clearly, carrots with badly watersoaked tops are not in a merchantable condition for resale as bunched carrots. Since the record showed that in the disposition of the shipment the undisclosed principal, Lewis D. Goldstein Co., Inc., realized \$157.29 less than the freight and incidental charges and refused to pay any part of the purchase price to Baldwin-Pope Marketing Co. there was no liability on the part of that respondent to the complainants for any part of the purchase price, and the complaint against it was also dismissed.

S-2642, May 10, 1941, Docket 3560: (Hearing)

S. STROCK & CO. INC., BOSTON, MASS. v. JOSEPH BECKER, SACRAMENTO, CALIF. and/or JOSEPH MARKETING CO., JOSEPH, OREGON.

Violation charged: Failure to account for deficits and balance of advance on ten cars of peas on consignment.

Principal point involved: Injured party may hold either agent or undisclosed principal, but generally not both, unless election not required.

Order: Complainant awarded \$1,942.19, plus interest, against respondents, jointly and severally.

B-19

Outline of Facts

On or about July 31, 1939, complainant advanced \$1000 to Joseph Becker, licensed as Associated Marketing Co., at the latter's request, to be repaid by deducting \$100 from the proceeds of each of the first ten carloads of peas and lettuce shipped by Becker to complainant for sale on commission. On or about August 2, Becker consigned 3 carloads of peas, shipped from Joseph, Oregon, to Boston, Mass. The peas in one car were abandoned to the carrier, but complainant paid \$31.94 for ice and inspection, resulting in a deficit to complainant in that amount; the peas in one car sold for \$406.75, but complainant deducted expenses, including freight, commission, an advance of \$540 for packing, \$100 of the \$1000 advance, and other charges, aggregating \$1204.64, leaving a deficit of \$797.89; and the peas in the third car sold for \$345.25, but expenses, including freight, commission, \$100 of the \$1000 advance, and other charges, aggregated \$657.61, leaving a deficit of \$312.36. Complainant asked for an award of \$31.94, plus \$797.89 and \$312.36 and the unpaid \$800 balance of the \$1000 advance, or \$1942.19. According to depositions of John J. & David Strock, complainant discovered that Richards & Co. was interested in the deal after demand was made for payment of the deficit. It was charged in the complaint, on information and belief, that Becker and Richards & Co. Inc. were acting as partners.

Copies of the complaint were served on the respondents by registered mail on February 23, 1940. Joseph Becker filed an answer on March 6, 1940. On April 6, attorneys for the Trustees in Bankruptcy of George F. Richards & Co. Inc. requested abatement of the proceedings as to the corporation because it was adjudicated a bankrupt on January 8, 1940 on its voluntary petition. There was no showing that complainant's claim was listed in the bankruptcy court or would be determined there. As it did not appear that any conflict would be caused, the request for abatement was denied on May 17, 1940. Neither respondent appeared at the hearing, but Joseph Becker wired that Richards & Co. handled the funds and that he, a victim of circumstances, was willing to pay Strock if given time. Attached to his answer was copy of his agreement with Richards Co., one paragraph of which read: "The relationship of the parties hereto is that of Employer and Employee in so far as George F. Richard & Co. Inc. and nothing herein contained should be construed to create the relationship of partners in the business of the party of the first part (Richards & Company) or anything herein contained to the contrary in any wise notwithstanding."

Findings included in Decision

1. The agreement between the respondents did not make the two parties partners, but did make Becker the employee or agent of George F. Richards & Co.

2. The respondents failed, in violation of section 2 of the act, truly and correctly to account promptly to the complainant. In the transactions involved, Becker acted as the agent of Richards & Co. but the complainant did not know of the agency until later. A party injured by the act of an agent or an undisclosed principal may hold either the agent or the principal responsible. The complainant, therefore, had a claim against either Becker or Richards & Co. It is the general rule that, in such circumstance, the claimant may hold either, but not both. He must elect which to hold, but may sue both and make his election before judgment. If the agent and the principal fail to require the claimant to elect, however, the failure constitutes a waiver, at least in some States, and judgment may be had against both principal and agent. Complainant, here, was not required by either of the respondents to elect. The hearing was held in New York, where it appeared to be the rule to give judgment against both principal and agent, if the complainant was not required to elect, so the rule was applied in this case. The agent, not having disclosed his agency, was liable as well as the principal for whom he acted, and they waived the requirement that the complainant must elect which of them it would hold. Complainant was therefore awarded \$1942.19, plus interest, against Joseph Becker and George F. Richards & Company, Inc., jointly and severally.

S-2643, May 10, 1941, Docket 3847: (S.P.)

C.H. ROBINSON CO., MINNEAPOLIS, MINN. v. ZELLERS COMMISSION CO., OKLAHOMA CITY, OKLAHOMA.

Violation charged: Failure to pay the full contract price for two carloads of tomatoes.

Principal point involved: On admission of liability by respondent, reparation awarded to assignee of seller

Order: Complainant awarded \$687.50, plus interest.

Outline of Facts

On or about April 25, 1939, respondent purchased, in interstate commerce, from C.B. Williams, doing business as Brown & Williams Company, Mercedes, Texas, a carload of 650 lugs of tomatoes, at \$1.25 per lug f.o.b. Mercedes, shipped on April 24. On or about May 4, 1939, respondent purchased from the said C.B. Williams, 650 lugs of tomatoes, at \$1.05 per lug delivered Oklahoma City, Oklahoma. Shipment was made from Mercedes April 30. Respondent accepted the tomatoes at Oklahoma City and paid a part of the purchase price of each carload, leaving an unpaid balance of \$687.50. C.B. Williams, on January 8, 1940, sold and assigned all of his rights, title and interest in and to the cause of action to C.E. Robinson Co. Reparation award in the sum of the amount due was sought.

The respondent admitted having purchased the two carloads of tomatoes and the parties agreed that the unpaid balance of the purchase price was \$687.50.

Ruling included in Decision

On respondent's admission of liability, and waivers of a formal hearing by the parties, complainant was awarded \$687.50, plus interest.

S-2644, May 12, 1941, Docket 3654: (Hearing)

Re: Application of Otis Sullivan, Little Rock, Arkansas, for a license under the Perishable Agricultural Commodities Act.

Principal points involved: Failure and refusal truly and correctly to account for produce received on consignment rendered him unfit to engage in the produce business.

Order: Otis Sullivan's application for license denied.

Outline of Facts

On February 24, 1940, Otis Sullivan applied for a license under the Perishable Agricultural Commodities Act, and on June 27 he was served with a notice of inquiry and order to show cause why a license should not be denied because of alleged failure truly and correctly to account promptly to Ragsdale Produce Co., Rogers, Arkansas, for 225 bushels of Jonathan apples which that company consigned to the applicant, while operating a fruit and produce business at Little Rock, on September 4, 1939, for sale for the shipper's account. The evidence showed that the applicant received the apples and, without the knowledge or consent of the shipper, reconsigned them for sale in interstate commerce. No proof was offered by the applicant in explanation or justification

of his failure to account, and evidence of witnesses taken in deposition form and who testified at the hearing, together with the exhibits offered and received, supported the allegations of the notice of inquiry. The examiner made and served on the applicant, by registered mail, on March 31, 1941, his report, which included suggested findings of fact, conclusions and a recommended order that the application for a license be denied. No exceptions were filed to the examiner's report by the applicant or the Agricultural Marketing Service.

Ruling included in Decision

The failure and refusal of the applicant truly and correctly to account promptly to Ragsdale Produce Co. was a violation of section 2 of the act and rendered him unfit to engage in the business of a commission merchant, dealer or broker. His application for a license under the act was therefore denied.

S-2646, May 13, 1941, Docket 3763: (S.P.)

H. D. JEFFORDS, INC., DETROIT, MICH. v. S.D. MONASH PRODUCE CO., CLEVELAND, OHIO.

Violation charged: Unjustified rejection of a carload of potatoes.

Principal point involved: Complainant failed to establish that the potatoes tendered met contract requirements.

Order: Complaint dismissed.

Outline of Facts

On or about October 4, 1939, through a broker, complainant sold to respondent a carload of U.S. No. 1, round white, Michigan potatoes, which were to be very good as to size and quality, and were not to be dark in color, at the agreed price of \$1.42 per cwt. delivered Cleveland, Ohio. A carload of 360 sacks was shipped from loading point in Michigan and on or about October 9 delivery was tendered to respondent, who refused to accept. Although complainant claimed that rejection was only on account of color, the broker's telegram notifying complainant of the rejection stated that it was "account dull color due to russet skin and dusty, they also finding fault as to size." Resale was made at Cleveland at \$1.15 per cwt., or at a loss to complainant of \$97.20, for which amount complainant asked for an award.

Federal-State inspection at shipping point on October 4 showed conclusively that complainant shipped U.S. No. 1, round white potatoes, which generally ranged in size from 1-7/8 to 3 inches, mostly 2 to 2-3/4 inches in diameter, less than 5% by weight being under 1-7/8 inches. The certificate also stated that "stock is fairly well matured, fairly smooth, fairly clean," but failed to include a statement concerning the color. The record did contain the following undated statement made by the inspector "they are good color, round whites of the rural russet variety." R.P.I.A. certificate, issued at Cleveland on October 9, stated that the potatoes were then "fair, few only fair quality. Medium, few large size. Mature. Firm, some slightly dirty and dull in appearance. Less than 1% decay noted." Certificate of Cleveland Inspection Bureau examination on October 9, stated that although the potatoes were of "poor size, very ordinary appearance, poor color," they met "requirements for U.S. Grade No. 1." This inspector stated he considered it a very ordinary car and the broker testified that it was his opinion that the potatoes did not meet contract requirements with reference to color, cleanliness, and size, but in a letter to the Department the broker stated that he considered it a good car of Michigan russets as far as color and condition was concerned and that the size was reasonably good.

Rulings included in Decision

1. Complainant failed to establish that the potatoes tendered met contract requirements. There was doubt with respect to the weight which could be attached to the undated statement of the inspector at shipping point, since there was nothing in the record to show the circumstances under which the statement was made. The Federal-State shipping point inspection certificate did not aid materially in resolving the issue as to whether the potatoes met contract requirements, either as to color or size, and the statement made by the broker could not be given weight because of conflicting statements made by him. The reports of the inspections made by the Cleveland Inspection Bureau and the R.P.I.A. clearly supported the respondent's position.

2. Respondent's rejection was not without reasonable cause, and the complaint was dismissed.

S-2654. May 21, 1941, Docket 3458: (Hearing)

JOSEPH ROTHENBERG, BUFFALO, N.Y. v. PEACOCK FRUIT CO. INC.,
ROCHESTER, N.Y.

Violation charged: Failure truly and correctly to account for a carload of grapes.

F-18
F-43
Principal points involved: Transaction was in interstate commerce since the goods remained in "in transit" status under interstate billing at a diversion point and resumed the interstate journey; title does not pass in an f.o.b. sale if goods of proper quality have not been appropriated to the contract.

Order: Complainant awarded \$309.08.

Outline of Facts

On or about November 14, 1938, complainant purchased a carload of grapes then on track at Buffalo, N.Y., and on or about November 18, by telephone, sold it to respondent at \$1.75 per lug delivered Rochester. The grapes, in the same car in which shipped from California, and under the same billing, were diverted to respondent, and on arrival respondent's employee made inspection early on the morning of Nov. 19 and reported them in poor condition. On Monday, November 21, respondent removed 150 lugs and protested to complainant that the fruit did not comply with contract. On November 22, the 948 lugs remaining in the car after removal of 150, were returned to complainant at Buffalo, where they arrived November 23, with broken bracing and some lugs broken as a result of shifting of the load. Complainant began unloading on December 3, rejected 165 broken lugs to the railroad, and sold the remaining grapes from storage between December 6 and December 19. Complainant claimed he sold the grapes on the basis of his inspector's report, evidently of November 14, which he read to respondent: "Collie brand, Emperor grapes, packed in display lugs, stems up, 28 lbs. net. Good level packs stems generally green to slight turning, bunches fairly compact to compact, medium to fairly large, few large, color generally good, few slightly greenish berries, medium to fairly large, well attached, 1 to 3% show slight wet, water berry decay ranges from 0 to 1%. Generally fairly good to good quality. Agreed with H. Will, R.P.I.A. inspector," and offered to check the car himself, which he did.

Respondent claimed that the transaction was not in interstate commerce and therefore not within the jurisdiction of the Secretary of Agriculture. Its witness testified that complainant promised to ship a carload of Collie Brand Blue Anchor grapes of "bang-up" quality, "something that will move out," and grapes comparable to an excellent carload purchased by respondent from complainant a few days previous, and that a new contract was entered into on November 19.

Rulings included in Decision

1. The case was properly within the jurisdiction of the Secretary of Agriculture. At the time of the transaction the interstate shipment of the goods had not ended inasmuch as they remained in a "in transit" status under an interstate billing at a diversion point and resumed the interstate journey under the impetus of the transaction in question.

2. The testimony of complainant's witness as to the terms of the contract of November 18 was more plausible than that of respondent's witness in that his version was more in accordance with the prevailing terms of produce contracts, and because the terms recited by respondent's witness were not commonly used and would not, because of their indefiniteness and relative character, afford standards by which to measure the quality of the goods appropriated to the contract. The only fair interpretation of complainant's statements was that the description alleged to have been read to the respondent was intended to represent the car as of November 18, since it was not alleged and not shown that the date or anything else on the inspector's report, other than the paragraph quoted, was read to respondent, and since complainant's statement that he promised to check the car personally to determine if it was as described clearly expressed his intention to describe the condition of the car as of November 18.

3. The weight of the evidence afforded by analysis of inspection reports, in which relatively more weight must be given to the inspections made by the R.P.I.A. representatives, who served in a neutral capacity, than to the reports of complainant's inspector, showed that the complainant did not deliver grapes of the condition which he admitted to have described to the respondent in the contract of sale. There was very little variance between the reports made on November 14 by complainant's inspector and the R.P.I.A. inspector. The latter classed the goods as "Fairly good quality," the former as "Fairly good to good quality," but, because of lack of exact definitions for the terms used, no significance was attached to the fact that the words used by complainant's inspector could possibly represent goods of a higher classification. However, it was important to note that both reports, one of which was read to respondent as a contemporaneous description of the produce at the time of sale, showed decay to have been less than one percent. On the

day after sale, November 19, R.P.I.A. report at Buffalo showed developing gray mold of less than one percent in most lugs and two percent to three percent in a few lugs, showing a deteriorating condition. Since four-fifths of the interim between the inspection on November 14 and the one on November 19 had elapsed before the time of the contract, November 18, it was permissible to reason that most, if not all, of the change in condition, the development of gray mold, took place before the sale on November 18. From the standpoint of considering whether there was sufficient cause for rescission or rejection because of the change in the condition between the quality and condition of the goods described in the contract and the quality and condition of the goods as delivered, it was significant to note that the gray mold discovered on delivery was "developing," i.e. the grapes were undergoing progressive deterioration. This fact severely and adversely affected the interests of the buyer, who purchased goods with the desire of retaining all or part of them over the period necessary for job-lot or retail disposal. There was insufficient evidence to determine whether the sale was made f.o.b. Buffalo, but the point was immaterial in this case since title does not pass in an f.o.b. sale if goods of the proper quality have not been appropriated to the contract.

4. Consideration of all the material offered in reference to respondent's claim of modification of the contract on November 19, under which 948 lugs were to be returned to complainant upon the payment of \$262.50 for the 150 lugs removed, from the car, plus $\frac{1}{2}$ the return freight charges, amounting to \$46.58, led to the conclusion that respondent had the more convincing evidence. The question of liability for damages incurred as the result of the bracing of the car having broken on the return trip to Buffalo, was not considered inasmuch as the evidence was insufficient to show that the bracing was inadequate or the fault of respondent. Complainant was awarded \$262.50, plus \$46.58, or \$309.08, the amount admitted by respondent to be due.

S-2655, May 23, 1941, Docket 3851: (S.P.)

H. A. SPILMAN, WASHINGTON, D.C. v. S. GOLDSAMT, INC., NEW YORK, N.Y.

Violation charged: Failure to preserve original sales tickets for two years.

Principal point involved: Above failure constituted a repeated violation of section 9 of the act and of the regulations.

Order: Respondent's license No. 46 suspended for 30 days, to become effective upon further violation of the act within one year from date of this order.

Outline of Facts

Disciplinary complaint was filed by H.A. Spilman, based on the following admitted facts: During the period December, 1938 to March, 1939, respondent received in interstate commerce and sold 8 carloads of lettuce. On June 5, 1940, a representative of the Agricultural Marketing Service, in connection with an investigation then being made in New York City to determine whether receivers of cars of lettuce had violated any of the provisions of the Perishable Agricultural Commodities Act when filing claims with carriers for transit freezing, requested respondent to produce original sales tickets for the lettuce in the eight cars, and it was explained that respondent believed that the act required the retention of sales tickets for a period of only nine months and that the sales tickets were destroyed after that period of time had elapsed.

A copy of the complaint was served on respondent on January 29, 1941. Respondent filed an admission of service and waiver of hearing on February 5, 1941, which authorized the Secretary of Agriculture to make and enter findings of fact in conformity with the allegations of the complaint, and to enter an appropriate order based upon the findings so made and entered. It was further provided in the admission of service and waiver of hearing that the respondent should be entitled to file with the Department a statement of reasons why the Secretary of Agriculture should be lenient in the imposition of the penalty provided in the act. In such request for leniency the respondent directed attention to the fact that, at the time it failed to produce the records requested, it was able to produce complete records for cars received within the period of nine months immediately preceding the date of investigation. That statement was consistent with facts alleged by the complainant. It was further stated by respondent that on July 23, 1940, it produced sales tickets requested by the Service with respect to a transaction not involved in this complaint.

Ruling included in Decision

The failure of respondent to retain the original sales tickets pertaining to the eight cars of lettuce for a period of two years constituted a repeated violation of section 9 of the act and of the regulations. It was ordered that license No. 46, issued to S. Goldsamt, Inc., be suspended for a period of 30 days, such suspension to be held in abeyance for one year from the date of this order, to become effective at any time within the one-year period upon the issuance of a supplemental order if the Secretary of Agriculture shall have reason to believe that respondent has again violated any provision of the act or regulations during that one-year period.

S-2658, May 21, 1941, Docket 3853: (S.P.)

H.A. SPILMAN, WASHINGTON, D.C. v. LEEF PRODUCE CO., INC., NEW YORK, N.Y.

Violation charged: Failure to keep original sales records for 2 years.

Principal point involved: Above failure constituted a repeated violation of section 9 of the act and of the regulations.

Order: Respondent's license No. 36730 suspended for 60 days, to become effective upon further violation within two years from the date of this order.

Outline of Facts

Disciplinary complaint was filed by H.A. Spilman, an employee of the U.S. Department of Agriculture, alleging that between November 1938 and February 1939, Justman & Co. Inc. "released" to the respondent 8 carloads of lettuce which had been shipped from western shipping points. On June 15, 1940, a representative of the Agricultural Marketing Service, in connection with an investigation that was then being made in New York City, requested that respondent produce the original sales records relating to the aforesaid cars. Respondent was unable to do so for the reason that the records had been among those used by the respondent's porter to start fires in a stove located in the store.

Respondent admitted a violation of the act, filed a waiver of hearing and consent to entry of order, but requested leniency in the imposition of a penalty for the reasons: (1) that the respondent has a good business reputation, and this is the first time it has ever been involved as a respondent in proceedings under the act; (2) that the records were destroyed by the respondent's porter without its knowledge or consent; and (3) that respondent had no incentive wilfully to destroy the records, as it was not directly involved in the investigation that was being conducted by the Department, but its records were requested in order to determine whether Justman & Co. Inc. had violated the act.

Ruling included in Decision

The failure of respondent to retain for two years the original sales records relative to the 8 cars of lettuce constituted a repeated violation of section 9 of the act, and of Regulation 4, section 1 of the Regulations. It was ordered that respondent's license No. 36730 be suspended for a period of 60 days, to be held in abeyance for a period of two years from the date of this order and to become effective at any time within the two year period upon the issuance of a supplemental order if the Secretary has reason to believe that respondent has again violated any of the provisions of the act or regulations during that two year period.

S-2659, May 21, 1941, Docket 3907: (S.P.)

H.A. SPILMAN, WASHINGTON, D.C. v. IRVING J. OKUN, NEW YORK, N.Y.

Violation charged: Failure to retain original sales tickets for two years.

Principal point involved: Above failure constituted a repeated violation of section 9 of the act and of the regulations.

Order: Respondent's license No. 35454 suspended for 60 days, to become effective upon further violation of the act or regulations within two years from date of this order.

Outline of Facts

Disciplinary complaint was filed by H.A. Spilman, an employee of the U.S. Department of Agriculture, based on the following admitted facts: In January 1939 and January, 1940, respondent purchased 2 carloads each of carrots and lettuce, which moved in interstate commerce. On June 13, 1940, a representative of the Agricultural Marketing Service, in connection with an investigation which was then being made in New York City, requested that respondent produce the original sales records relating to the four cars. The only records produced consisted of car jackets containing such papers as incoming invoices, wires, diversion or passing memoranda, and claim statements filed with the carrier. The car jackets did not contain the original sales tickets or information sufficient to disclose fully the facts pertaining to the transactions with respect to the four shipments, and respondent admitted that the original sales tickets were discarded or thrown away.

In lieu of an answer respondent filed, on April 16, 1941, an Admission of Service, Waiver of Hearing, and Consent to Entry or Order, to which was attached an affidavit setting forth the following allegations in support of a plea for leniency in the

disposition of the case; that until recently respondent did little consignment business and did not consider the keeping of records important; that respondent was not familiar with the provisions of the act that records be kept for two years; that since June, 1940, all records on all cars handled have been scrupulously kept; that the records previously discarded were disposed of in order to save space and not for ulterior reasons; that no similar complaint has ever been previously brought against respondent; that the instant violation was not discovered as the result of a complaint by a shipper or receiver; and that respondent would be irreparably damaged if the fact that a disciplinary complaint had been filed against him for failing to keep records were published.

Ruling included in Decision

The failure of respondent to retain for a period of two years the original sales tickets relating to the four shipments of lettuce and carrots constituted a repeated violation of section 9 of the act and of Regulation 4, section 1, of the Regulations. It was ordered that respondent's license No. 35454 be suspended for 60 days, to be held in abeyance for a period of two years from the date of this order, to be made effective at any time within the two-year period by supplemental order if the Secretary has reason to believe that respondent has again violated any of the provisions of the act or the Regulations during the two-year period.

S-2660, May 21, 1941, Docket 3854: (S.P.)

H.A. SPILLMAN, WASHINGTON, D.C. v. YECKES-EICHENBAUM, INC., YECKES BROS., INC., and D. EICHENBAUM, INC., NEW YORK, N.Y.

Violation charged: Failure to retain original sales records for two years.

Principal point involved: Above failure constituted a repeated violation of section 9 of the act and of the regulations.

Order: License of each of respondent corporations suspended for 30 days, to become effective upon further violation of the act or Regulations within one year from date of this order.

Outline of Facts

Disciplinary complaint was filed by H.A. Spilman, an employee of the U.S. Department of Agriculture, based on the following admitted facts: During January, February and March, 1939, respondents received and sold seven interstate carloads of lettuce and one interstate carload of California carrots. On June 6, 1940, a representative of the Agricultural Marketing Service, in connection with an investigation that was then being made in New York City, requested that respondents produce original sales records relating to these cars. Respondents produced merely the car jackets which contained such papers as incoming invoices, copies of accounts sales rendered, telegrams, diversion or passing memoranda, and claim statements filed with the railroad. They were unable to produce the original sales tickets for the admitted reason that they had been thrown ^{away} or discarded during the summer of 1939.

Respondents admitted the facts, filed a waiver of hearing and consent to the entry of an order, but asked for leniency in disposition of the case on the ground that until the summer of 1939, when respondents made arrangements to alter the attic of the premises at 335 Washington Street into additional offices, respondents' records were kept in the attic of these premises; that in renovating the attic it was necessary to move the records; that respondents directed an employee to preserve all records respecting transactions which had occurred within three years but to destroy all others; that the records were divided into two piles but, through carelessness or misunderstanding of the porters who were directed to remove the old records, both piles, rather than the one intended, were taken from the building and destroyed. Respondents indicated that the destruction was without their knowledge or consent; that they had no ulterior purpose to destroy them; that their loss was discovered through collateral investigation by the Department rather than from an investigation instigated by a shipper; and that their good reputation would be damaged by the entrance of a disciplinary order against them.

Ruling included in Decision

The failure of the respondents to retain the original sales records for a period of two years constituted a repeated violation of section 9 of the act and of regulation 4, section 1, of the Regulations. It was ordered that license No. 41768, issued to Yeckes-Eichenbaum, Inc., license No. 23691, issued to Yeckes Bros., Inc., and license No. 12268, issued to D. Eichenbaum, Inc., be suspended for 30 days, to be held in abeyance for a period of one year from the date of this order and to be made effective at any time within the one-year period by supplemental order if the Secretary of Agriculture has reason to believe that respondents have, within the one-year period, again violated any of the provisions of the act or the regulations.

S-2665, May 31, 1941, Docket 3885: (S.P.)

MILLER-JOHNS CO., PHOENIX, ARIZONA v. SHREVEPORT BROKERAGE CO., SHREVEPORT, LA.

Violation charged: Failure to pay the full purchase price for a carload of lettuce.
Principal point involved: Failing to account for full agreed purchase price was violation of section 2 of act.
Order: Complainant awarded \$156.38, plus interest.

Outline of Facts

On or about April 3, 1940, complainants sold to respondent one carload (300 crates) of lettuce, at \$2.50 per crate delivered Rayville, La. (stop off at Shreveport, La., for partial unloading), or for \$750 less freight and brokerage of \$331.12, making the net price \$418.88. Shipment was made from loading point in Arizona, and upon arrival at destination complainants and respondent agreed, by telephone, that an allowance of 10¢ per crate on 125 crates should be deducted from the contract price, reducing it to \$406.38. Respondent accepted the shipment in accordance with the revised contract of sale but paid to complainants only \$250, leaving a balance of \$156.38 due and owing, for which an award was asked.

A copy of the complaint was served on respondent by registered mail on March 4, 1941, but no answer was filed.

Ruling included in Decision

Respondent violated section 2 of the act by failing to account to complainants for the full agreed purchase price for the lettuce. Complainants were awarded \$156.38, plus interest.

S-2666, May 31, 1941, Docket 3897: (S.P.)

JOSEPH ALESSI, JR., INDEPENDENCE, LA. v. DuMAINE BROS. & CO. INC. and DuMAINE & COMPANY, PADUCAH, KY.

Violation charged: Failure to pay for four l.c.l. shipments of strawberries.
Principal point involved: Purchaser liable for purchase price of goods accepted.
Order: Complainant awarded \$30.25, plus interest, against DuMaine & Company; order awarding \$147.50, plus interest, against DuMaine Bros. & Co. Inc., vacated by order of January 13, 1942.

Outline of Facts

On April 24, 25 and 28, 1940 complainant delivered to Nolan A. DuMaine a total of 65 crates of strawberries at prices totaling \$147.50 f.o.b. Independence, Louisiana, believing the sale was made to DuMaine Bros. & Co. Inc. On May 3, 1940, complainant sold to Alfred LeGeay, doing business as DuMaine & Company, 11 crates of strawberries at \$2.75 per crate, or for \$30.25 f.o.b. Independence. Shipment was made by express to Paducah, Kentucky, and the produce was accepted. Complainant asked for an award to cover the amounts of the purchase prices.

A copy of the complaint was served on each respondent on March 10, 1941, but neither filed an answer.

Rulings included in Decision

Respondents violated section 2 of the act by failing to account promptly for the purchase price of the strawberries. Complainant was awarded \$147.50, plus interest, against DuMaine Bros. & Co. Inc. and \$30.25, plus interest, against Alfred LeGeay, trading as DuMaine & Co.

H.G. McElwee, as liquidating agent for DuMaine Bros. & Co., petitioned for a reconsideration of the decision and order, stating that on February 3, 1940 the stockholders of DuMaine Bros. & Co. agreed, in writing, that the corporation be dissolved and its affairs liquidated, which was done subsequently, and that the corporation did not purchase any strawberries on the dates mentioned. Affidavit of Nolan A. DuMaine, Vice President of the corporation prior to February 3, 1940, attached to the petition, stated he purchased the strawberries in question and admitted owing complainant a total of \$177.75. The award of \$30.25 against Alfred LeGeay doing business as DuMaine & Company, has been paid. The petition for reconsideration was granted, and on January 13, 1942, a new order was issued, by which the order of May 31, 1941 was vacated as to DuMaine Bros. & Co. Inc. and the complaint as to that company was dismissed, since in April, 1940, it was in the process of being dissolved and was not engaged in business and did not purchase and receive the shipments in question.

S-2667, June 4, 1941, Docket 3811: (S.P.)

THE SCHOENBURG COMPANY and/or FRESH FOODS CO., CHICAGO, ILLINOIS v. AMERICAN FRUIT GROWERS INC., LOS ANGELES, CALIF.

Violation charged: Failure to deliver two carloads of carrots in accordance with contract.

Principal point involved: The expressions "bang up" and "just as good as" are so indefinite they must be left open to area of tolerance for differences of opinion as to meaning.

Order: Complaint dismissed.

F-39

P-5

Outline of Facts

On or about February 27, 1940, Schoenburg went to the office of Fresh Foods Co., to purchase carrots. Fresh Foods communicated with respondent and negotiated for the purchase, at \$1.05 per crate f.o.b., of two carloads of U.S. No. 1 Coachella carrots which were en route to Chicago from California, stated by respondent to be "strictly bang-up" and "just as good" as a car of Brawleys which had just been purchased, and "in fact might be a little smoother." Upon arrival of these two cars, Fresh Foods Co. notified respondent that the carrots were not in compliance with the warranty since they were not comparable to the Brawleys, but Government inspection showed that they graded U.S. No. 1 and respondent refused to take them back. Schoenburg sold the two cars at prices of \$1.95 to \$2 per crate delivered, on March 2. The Brawleys had been sold on March 1, at \$2.35 per crate delivered, and Schoenburg claimed to have been damaged in the sum of \$261, because of respondent's alleged breach of warranty.

Respondent denied any breach of contract, stating that the statement that the Coachellas were "strictly bang-up" and "just as good as" and perhaps "a little smoother than" the Brawleys was merely sales talk and did not constitute an express warranty.

Government inspection certificate issued at shipping point on the Brawleys stated: "Carrots firm and clean; mostly well colored, smooth and well formed, some fairly well colored, fairly smooth and many fairly well formed. ***Defects average within grade tolerance." Destination certificate on the same car showed: "Carrots well shaped, smooth, clean, well colored." There were no shipping point certificates on the Coachellas, but the destination certificates showed the carrots in one car to be "fairly clean to clean, generally well formed, fairly smooth to smooth, fairly well to well colored, mostly well colored;" and those in the other to be "mostly well shaped, many fairly well shaped; mostly smooth, many fairly smooth, fairly clean; mostly well colored, some fairly well colored." Destination certificates on all cars showed grade defects to be well within tolerance.

Rulings included in Decision

1. Complainants failed to sustain the burden of proving a breach of warranty. A comparison of the destination inspection certificates on the Coachellas with the shipping point inspection certificate on the Brawleys showed that, although there were differences in the various elements of quality, the differences were so slight that they were hardly perceptible in the language used in the inspection certificates. Destination certificate on the Brawleys not only showed them to be superior to the Coachellas,

but superior to themselves as they appeared at shipping point. It was hard to perceive how they could have been any better at destination than at shipping point. The comparison served merely to emphasize the fact that the difference between the carrots in the three cars were so slight as to become almost a matter of conjecture. One inspector looked at the Brawleys and found them to be almost identical with the other two cars, whereas a second inspector found them slightly superior to the other two cars and superior to themselves as they had appeared at shipping point. It seemed clear that when differences were so slight as in this case it would not be fair to hold that there was a breach of warranty when the seller said that one lot was just as good as another. Such statements in their nature can not be intended to lend themselves to absolute preciseness. Since official market reports showed that the market for carloads on March 1 was "about steady on best stock, weak on other stock, generally asking \$2.10," while on March 2 the market was "weak, a few sales at \$2," it was apparent that the Brawleys probably would not have brought \$2.35 on March 2, when the market on best stock was "weak" rather than "about steady," and when the market price was \$2 instead of \$2.10. The P.A.C.A. Decision, holding that a breach of warranty occurred on potatoes which were reported as "clean" and were shown by official inspection to be "fairly clean," cited by complainants as controlling in this case, was not applicable. "Clean" is a definite term when used to describe perishable commodities, and there is no reason for substantial differences of opinion as to the meaning of such a term, while "just as good as" and "bang up" are so indefinite that there must be left open an area of tolerance for differences of opinion as to what the parties meant when they used such terms. The complaint was dismissed.

2. Since respondent did not fail to deliver carrots of the kind and quality specified in the contract of purchase, it fully performed its contract, making it unnecessary to decide whether the statements amounted to a technical warranty.

S-2672, June 9, 1941, Docket 3631: (Hearing)

WILEMAN BROS. & ELLIOTT, CUTLER, CALIF. v. S. & L. FRUIT CO., INC., NEW YORK, N.Y.

Violation charged: Unjustified rejection of six carloads of grapes.

Principal point involved: Wire did not change contract from f.o.b. to delivered basis; Thompson seedless grapes showing 10-15% shattered berries upon arrival at destination considered as deteriorating abnormally and were not in suitable shipping condition.

Order: Complainants awarded \$1819.25, plus interest.

F-1

F-13

Outline of Facts

On June 22, 1939, respondent placed an order with complainant, through a broker, for the sale and future shipment of 15 carloads of Thompson Seedless (girdled) grapes at the agreed price of 60¢ per lug f.o.b. Cutler, Calif. The standard confirmation of sale, dated July 6, authorized complainants to ship grapes "when ready-one car daily for 15 days," and provided that the complainants would furnish "either U.S. Fancy or U.S. No. 1 at their option to insure good grapes." Upon arrival of the first two carloads respondent refused to accept one car and attempted to cancel its contract. On August 25, the parties agreed to a modification of the original contract whereby complainants accepted both these cars and agreed that 7 additional carloads then in transit and one which was loaded and on track at shipping point might be tendered by complainants. From August 16 to 25, complainants shipped 9 carloads, one more than called for by the modified contract, and complainants accepted and paid the agreed price for three, refusing the other six, five of which were resold at auction by complainants for total net proceeds of \$1474.75. Complainants contended that the rejection of the six carloads was unjustified since the grapes conformed to grade at shipping point, and asked for an award for damages sustained because of rejection.

Respondent insisted that by the modified agreement it was to accept the cars that were rolling provided they were U.S. No. 1 at New York.

Federal inspection of the five cars at Cutler, California at the time of shipment showed that the grapes graded U.S. No. 1 Table, and that one carload showed no decay and the other four were "practically free from mold or decay."

Four of the cars were federally inspected at New York City, the inspections being on August 28, 31 and September 1, the certificates showing:

1. 10 to 15% shattered berries in some lugs, "in most lugs no decay, in some from less than 1 to 4%." The grapes failed to grade U.S. No. 1 only on account of "shattering and decay."
2. "In some lugs" shattered berries ranged from 10 to 15%, and decay was noted as less than 1/2 of 1%. Grapes failed to grade U.S. No. 1 only on account of "shattering."

3. "In some lugs" the berries shattered "upon handling," and from 10 to 15% of the berries were shattered. In most lugs there was "no decay, in some from less than 1% to 2% and averaging less than 1%, Gray Mold Rot." The grapes failed to grade U.S. No. 1 Table "only account shattering and decay."
4. "From 2% to 8% shattered berries" and "in most lugs" there was "no decay, in many from 1/2% to 1% to 2%, and averaging less than 2% Rhizopus rot, advanced stages." The grapes failed to grade U.S. No. 1 Table only on account of "decay."

Binney Inspection Service certified the grapes in the fifth car as showing decay that ranged from "less 1 to 7 average 1% decay generally found interspersed thru out pack and affecting mostly 1 to 4 berries per bunch. 3% packs showing 3 to 7% decay . . ."

Rulings included in Decision

1. The original contract called for shipment of grapes "either U.S. Fancy or U.S. No. 1" at complainants' option. Both parties pointed to a wire of August 25 to sustain their respective contentions. The particular language of the wire, quoted in the decision, and which respondent said changed the basis of the purchase read "*** with understanding we will not compel delivery of any cars except as specified in our contract ***." It was not believed that it was the intention of the parties as indicated in the language used to change the original contract from an f.o.b. shipping point basis to a New York City delivered basis. The words "as specified in contract" may well have meant the original contract. The broker, in a letter of September 10, said that respondent's agent authorized him to wire complainants "that the delivery of all cars shall conform to the specifications of our original contract of sale."

2. Since one more car was shipped than the modified contract called for, respondent was not required to accept that shipment.

3. Respondent's rejection of the five carloads was without reasonable cause. Examination of the Federal and Binney Inspection Service reports on the grapes contained in the three carloads that were accepted, and the five carloads that were rejected, showed that they were generally similar. Inspection of the grapes in the five cars that were rejected compared very favorably with the condition of the grapes in the three cars that were accepted. There was nothing in these reports which could be said to support a finding of fact that the grapes in the five cars that were rejected were not in suitable shipping condition at the time they moved from California loading point. Complainants were awarded \$1819.25, plus interest.

Rehearing

On June 26, 1941, respondent filed a petition for reconsideration of this order, requesting that the finding that the grapes shipped in three of the cars were in suitable shipping condition be reexamined. The petition was granted because it appeared that the issue was not free from doubt. The parties each filed supplemental briefs and supplemental reply briefs with respect to the issue to be reconsidered.

Supplemental order issued on April 23, 1942 found that the grapes in question, because of excessive shattering, did deteriorate abnormally before their arrival at destination. Federal inspection certificates on the three cars uniformly described their condition as: "berries are firm, in most lugs firmly attached to capstems, in some lugs shatter upon handling and showing from 10 to 15 percent shattered berries . . ." Although in one of the cars there was sufficient decay to affect the grade of the grapes, the question for determination could be resolved into whether these shipments, which showed from 10 to 15 percent shattered berries "in some lugs," had abnormally deteriorated. In regard to this question, it was significant that the report of investigation showed that of 154 federally inspected shipments of similar grapes from the West Coast to New York City during 1939 (the year in which the disputed shipments were sold), 83 percent of these lots showed no shattering. Moreover, in only $2\frac{1}{2}$ percent of these lots was there as much as from 10 to 15 percent shattered berries. Although the shattering in the present instance affected only "some" of the lugs (that is, from 10 to 25 percent), it was none the less quite apparently an excessive defect. These grapes were therefore not in suitable shipping condition and respondent's rejection thereof was with reasonable cause.

The amount of reparation awarded by order of June 9, 1941 was determined by deducting the net proceeds of the five carloads, which had already been paid to the complainants, from the contract price. The contract price of the three cars in question was \$1,976.40 and the net proceeds were \$1,020.20. The difference of \$956.20 was the amount by which the award of \$1,819.25 was excessive, in that it erroneously included reparation for the three shipments under discussion. Complainant was therefore awarded \$1819.25 less \$956.20, or \$863.05, with interest at 5% from September 1, 1939, until paid, instead of the award set forth in the order of June 9, 1941.

S-2680, June 19, 1941, Docket 3752: (Hearing)

Re: Application of Jacob Levy, doing business as Levy Produce Company, of Indianapolis, Ind., for a license under the Perishable Agricultural Commodities Act.

Principal point involved: Bona fide differences of opinion between buyer and seller, in case pending in court, did not show practice of character prohibited by act.

Order: The Order to Show Cause why a license should not be denied was dismissed.

Outline of Facts

On October 25, 1940, an Order to Show Cause why a license should not be denied this applicant was issued by the Department, alleging that the applicant was unfit to engage in the business of a commission merchant, dealer or broker and that he should be denied a license. It was also alleged that the applicant and his partner, on or about July 9, 1940, purchased a truckload of tomatoes, which had been shipped in interstate commerce, on which there was a balance due of \$400.

The evidence disclosed that there was a bona fide difference of opinion between the purchaser and the seller concerning the contract for the tomatoes. After the parties had entered into negotiations with a view to settling the matter amicably, a complaint and counter complaint were filed, and at the time of the hearing the matter was still pending in the Municipal Court of Marion County, Indiana.

Ruling included in Decision

The record did not show that the applicant engaged in practices of a character prohibited by the act. The Order to Show Cause was therefore dismissed.

S-2682, June 26, 1941, Docket 3670: (Hearing)

PACIFIC COAST FRUIT DISTRIBUTORS, INC., LOS ANGELES, CALIF. v. UNITED BROKERS CO., PORTLAND, OREGON

Violation charged: Failure to pay the full purchase price of a carload of lemons.

Principal point involved: That complainant entitled to brokerage rather than commission shown by charge in another transaction between parties mentioned in counterclaim.

Order: Complainant awarded \$717.13, plus interest.

Outline of Facts

The record in this proceeding is substantially the same as that in the companion case of H.A. Spilman v. United Brokers Co., S-2376 (which was based on the same transaction) except that in this case respondent pressed its claim for a set off of \$761.75 arising out of another transaction between the parties. For an outline of the facts and the rulings included in the decision see S. 2376.

Additional rulings under this Decision

1. The proof failed to establish the validity or existence of respondent's claim against complainant for \$761.75, so no consideration could be given to that aspect of the case.

2. An invoice, placed in the record by complainant, set forth a brokerage fee of \$25, whereas the accounting made by respondent contained a commission charge of \$40.60. Neither party submitted additional proof, nor did the wires exchanged between the parties contain any reference to brokerage. The evidence submitted by the respondent, however, with respect to its counterclaim arising out of another carload of citrus fruit sold by respondent for complainant, showed that a brokerage charge of \$25 was made with respect to that transaction. Complainant was therefore awarded \$1319.50, the amount due for 406 boxes of lemons at \$3.25 per box, less \$252.37 freight charges, \$25 brokerage charges, and the \$325 payment on account, or \$717.13.

S-2692, July 5, 1941, Docket 3976: (S.P.)

T.C. CURRY, WASHINGTON, D.C. v. RAPHAEL & FISHMAN, INC.,
NEWARK, N.J.

Violation charged: Failure to truly and correctly account and remit full proceeds of sale to consignors for commodities sold for their accounts.

Principal point involved: Failure truly and correctly to account constituted flagrant and repeated violations of section 2 of act.

Order: Respondent's license suspended for 90 days, to become effective upon further violation of the act or regulations within three years.

Outline of Facts

Disciplinary complaint was filed by T.C. Curry, an employee of the U.S. Department of Agriculture, based on the following transactions, settlements in which were made subsequent to the filing of this complaint:

On or about November 4, 1940, respondent received, at Newark, N.J., from W.T. Roberts, Birds Nest, Va., for sale for the shipper's account, 202 hampers of beans, which were reported sold at 40¢ per hamper, 24 hampers of sweet potatoes, reported sold at 50¢ each, and 39 hampers of lima beans, reported sold at \$1 each, whereas 10 hampers of beans were sold at 50¢ each and 192 hampers at 50¢ each, 39 hampers of lima beans at \$1.25 each and 24 hampers of sweet potatoes at 60¢ each, making total gross sales of \$164.75 instead of \$131.80 as reported.

During the period October 24 to and including December 28, 1940, respondent received and sold for the joint account of respondent and the shipper, Roy Vandegrift, Pahokee, Florida, 14 carloads of green beans, for which he accounted on the basis of \$11,412.08, whereas the beans sold for gross proceeds of \$13,890.04, through such incorrect accounting failing to account and remit to the shipper, on the joint transaction, the sum of \$988.98.

Respondent filed an answer to the complaint, wherein "discrepancy in accounting" to the shippers was admitted. Based on the verified complaint, the respondent's admission of facts therein alleged, and the exhibits which were attached to and made a part thereof, the examiner made a report, consisting of proposed findings of fact, conclusions and recommended order, a copy of which was served on respondent, who filed no exceptions.

Ruling included in Decision

Respondent's failure truly and correctly to account promptly to the shippers constituted flagrant and repeated violations of section 2 of the act. It was therefore ordered that respondent's license No. 33691 be suspended for a period of 90 days, to become effective at any time within 3 years from the date of the order upon the issuance of a supplemental order if the Secretary of Agriculture shall have reason to believe that the respondent has again violated any of the provisions of the act or regulations during those three years.

S-2699, July 14, 1941, Docket 3730: (S.P.)

MRS. MARY MATHEWS, MANHATTAN, KANSAS v. THE W.O. ANDERSON
COMMISSION CO., TOPEKA, KANSAS.

Violation charged: Failure to pay for
131 boxes of grapefruit.

B-3 Principal point involved: An agent with
B-8 authority to sell and deliver is
impliedly authorized to receive pay-
ment.

Order: Complainant awarded \$157.10,
plus interest; publication of facts.

Outline of Facts

On or about April 8, 1940, Neal Mathews, the complainant's husband, sold to respondent 131 boxes of grapefruit, from a truck-load shipped from Mission, Texas, at \$1.40 per box, or \$183.40, delivered at Topeka, Kansas. Respondent accepted the fruit, but in making payment deducted \$136.24, alleged to be owed by Neal Mathews, and \$1.30, representing a telephone call, the deduction of which was stated to have also been agreed to by Neal Mathews, leaving a balance of \$45.86. Respondent issued two checks, one for \$41.60 and one for \$4.20, in payment of the amount due, both payable to the order of Neal Mathews. Complainant returned these checks and demanded payment to her of the full amount of the contract price, claiming she was the owner of the grapefruit. Respondent, in reply to that contention, stated that this was the first knowledge given to it of any claim of ownership of the grapefruit by the complainant, who asked for an award for the amount due.

Respondent, in its answer, denied any indebtedness to complainant, maintaining that the contract was between respondent and Neal Mathews. Complainant contended that the inspection certificate showing title in her, was read by an employee of the respondent; this was not denied, but respondent stated its former employee was then in California and could not be reached. Complainant's exhibits, signed by Neal Mathews, were statements that he told respondent the grapefruit was not his and that his commission only, amounting to \$25, could be applied to his indebtedness; this statement was denied by respondent, who contended that if Neal Mathews was complainant's agent, all the acts done were within the scope of his authority as agent.

Rulings included in Decision

1. The produce involved was the property of complainant and respondent knew, or from the facts shown by the record, was charged with the knowledge, that Neal Mathews was acting as agent for complainant.

2. Respondent, in violation of section 2 of the act, failed to account truly and correctly to the complainant for the grapefruit in question. It is true that an agent with authority to sell and deliver possession is impliedly authorized to receive payment, but an agent has no implied authority to devote to his own use a part of the proceeds which he receives, and by applying any part of the proceeds as a credit to the agent's account, respondent wrongfully withheld that amount, unless specifically authorized by the principal. If respondent had dealt with Neal Mathews as owner, he would have acted at his own peril in paying or crediting one with money when the one so paid or credited was not the owner. Complainant was awarded \$183.40, less \$25, Neal Mathews' commission, the credit of which toward his indebtedness was consented to by complainant, and \$1.30 telephone expense authorized by Neal Mathews while in the conduct of the business on behalf of his principal, the complainant, or \$157.10, plus interest.

S-2700, July 16, 1941, Docket 3839: (Hearing)

GRAVES BROTHERS CO., WABASSO, FLA. v. LEWIS D. GOLDSTEIN CO., INC., PHILADELPHIA, PA.

Violation charged: Failure to pay for a carload of tomatoes.

Principal point involved: An amicable settlement between the parties having been reached, case was dismissed at counsel's request.

Order: Complaint dismissed.

Outline of Facts

About May 16, 1940, respondent purchased from complainant, for shipment in interstate commerce from Wabasso, Florida, to Philadelphia, Pa., a carload of tomatoes. Complainant alleged that the sale was made f.o.b. Wabasso for the agreed price of \$1408.20, for the payment of which complainant asked for an award.

Respondent, in its answer, denied that the tomatoes shipped were of the quality called for in its contract of purchase, and claimed that they were not in good marketable condition on arrival and caused respondent a loss. It was alleged that only \$397.37 was realized from the sale of them, which amount respondent was willing to give to complainant in full settlement.

A hearing was begun in Philadelphia on May 21, 1941, but, at counsels' request, it was continued until the following day. Complainant's counsel stated that an amicable settlement had been reached, and moved that the complaint be dismissed. He said that, after seeing evidence not available to complainant until just before the hearing, it was his conclusion that respondent had a reasonable basis for its defense, both legally and morally.

Ruling included in Decision

Counsel for both parties having agreed that whatever should have been paid for the carload of tomatoes by the respondent had been settled, the hearing was closed, and the complaint was ordered dismissed.

S-2704, July 26, 1941, Docket 3233: (Hearing)

P. RAFELSON, CHICAGO, ILL. v. JOHN T. HANDY CO., CRISFIELD, MARYLAND.

Violation charged: Failure to deliver two carloads of tomatoes in accordance with the specifications of the contract.

Principal points involved: The terms "globe type" and "flat type" as applied to tomatoes are not susceptible of exact definitions; variation in market price may have caused loss; practice of attaching exhibits to pleadings is proper, but this does not make them competent and receivable in evidence over proper objection.

Order: Complaint dismissed.

Outline of Facts

On or about July 8, 1938, complainant purchased from respondent two carloads of U.S. No. 1 globe type tomatoes at \$1.00 per lug, f.o.b. shipping point. The two carloads of tomatoes were shipped in interstate commerce by respondent from Crisfield, Maryland and accepted by complainant at Chicago, Illinois, who sold them between July 15 and July 22, 1938. Complainant thereafter filed a complaint alleging that the tomatoes shipped by respondent

were "flat type" rather than "globe type," as specified in the contract of sale, and that because of the variance in type the proceeds of the resale by complainant were less than would have been obtainable had the goods complied with contract specifications.

Inspection certificates of the Federal Inspection Service at Chicago were issued on the two carloads of tomatoes July 15, 1938. With respect to the type of tomatoes in car FGEX 51128, the certificate reads:

"Stock mostly of globe shape, many intermediate in shape between globe and flat, a few distinctly flat type tomatoes, mostly in larger sizes."

The certificate on car WFEX 63381 gives the same description in these words:

"Stock mostly of globe shape, many intermediate between globe and flat, a few distinctly flat type tomatoes, mostly in larger sizes."

Rulings included in Decision

1. The terms "globe type" and "flat type," as applied to shipments of tomatoes, are not susceptible of exact definition. The classification of the shipment as being "globe type" or "flat type" depends on the customs and practices of those experienced in examining and handling tomatoes.

2. The Federal Supervising Inspector at Chicago explained that the word "mostly" is used in Government certificates to denote a quantity of 50 percent or more; the term "many" to denote a quantity ranging from 25 percent to 49 percent; and the term "few" to denote a quantity up to 10 percent. Applying these definitions, it is possible for the tomatoes in question to have been between 74 and 75 percent globe type, 25 percent intermediate in shape, and the remainder distinctly flat. This witness stated that it was quite possible that a tomato of intermediate shape would be classed as "globe type" by the Department, whereas the classification of such tomatoes as "flat type" would be very improbable. The inspection certificates exhibited by the complainant and the interpretation placed on them by this witness, plus the testimony of witness Daus, conflict with and impair the value of the testimony of the other witnesses who testified for the complainant, one of whom placed the percentage of flat tomatoes at 75 percent and the other at some point between 40 percent and 75 percent. On the facts presented, with relatively more weight being given to the inspection certificates and the testimony of the Government inspector as impartial sources of information, it was held that the complainant had failed to prove that the tomatoes delivered could not be properly described as globe type.

3. Complainant submitted no evidence to show it suffered any damage by the alleged breach. The amount of damages recoverable on a breach of warranty of quality is the difference between the price the commodity would have brought had it been of the quality described and the price received for the quality actually delivered. The complainant in this case has only shown that the tomatoes received were sold for less than the contract price f.o.b. Crisfield, Maryland, plus freight and handling charges at Chicago. Other causes, such as a variation in the market price between the time of purchase and the time of sale at Chicago, could have caused the loss, as well as the failure of the tomatoes to be globe type. Since complainant did not prove the allegation of a violation of the act by the respondent, the complaint was dismissed.

Reconsideration

Complainant filed a petition for reconsideration. One of the grounds on which the petition was based was that "he was unable to secure a full, fair and impartial hearing" because the examiner sustained objections made to the admission in evidence of certain exhibits attached to the complaint but which had not been identified or offered in evidence. The depositions of four witnesses had been taken on complainant's application prior to the hearing. The testimony of such witnesses and the exhibits identified by them and offered as evidence were received by the examiner. At the same time the examiner announced that all exhibits that were attached to pleadings and made a part thereof would be considered as a part of the record unless objection was made thereto. Respondent then objected to the receipt of certain exhibits on the ground that they had not been identified by any of the deposition witnesses and had not been offered in evidence, and that no opportunity had, therefore, been afforded respondent to cross-examine any witness concerning the exhibits. These objections were sustained.

In an order issued November 24, 1941, it was stated that the practice of attaching exhibits to pleadings as a part thereof is a proper one but this does not make them competent and receivable in evidence over proper objection. The objections in this case seem to have been meritorious and were properly sustained by the examiner. The complainant's petition, therefore, was denied.

S-2705, July 26, 1941: (Hearing)

DOCKET 3704 - JAMES E. ROBERTSON, WINCHESTER, VA. v. BREAM-HEEB CO., CHAMBERSBURG, PA. DOCKET 3613 - BREAM-HEEB CO., CHAMBERSBURG, PA. and SHEELY BROTHERS, McKNIGHTSTOWN, PA. v. JAMES E. ROBERTSON, WINCHESTER, VA. DOCKET 3734 - W. VAN BOKKELLEN, ASSIGNEE, NEW YORK, N.Y. v. BREAM-HEEB CO., CHAMBERSBURG, PA.

Violation charged: Failure of Bream-Heeb Co. to deliver two lots of apples in accordance with contract; failure of James E. Robertson to pay the purchase price of the apples; failure of Bream-Heeb Co. to furnish apples in accordance with contract.

Principal point involved: Failure to establish breach of contract necessitated dismissal of complaints.

Order: Complaint of James E. Robertson against Bream-Heeb Co. dismissed; complaint against James E. Robertson dismissed; complaint of W. Van Bokkelen, Assignee, against Bream-Heeb Co. continued for further hearing.
(see S-2834)

Outline of Facts

On or about November 1, 1938, Sheely Bros., acting through their agent Bream-Heeb Co., sold to A.B. Oscar Appelgren & Co. in Sweden, through James E. Robertson, as agent, 4888 bushels of U.S. No. 1 Newtown Pippin apples, at the agreed price of \$1.22 per bu. for size $2\frac{1}{4}$ to $2\frac{1}{2}$ inches, and \$1.32 per bu. for size $2\frac{1}{2}$ inches and larger, and later 231 bushels of U.S. No. 1 Newtown Pippins, size 2 to $2\frac{1}{4}$ inches at \$1 per bushel, all f.a.s. Baltimore, Md. On or about December 30, 1938 James E. Robertson accepted, for and on behalf of his principal in Sweden, 1280 bushels as partial delivery. The apples arrived in Sweden January 24, 1939 and were accepted by the purchaser, who reported that they "arrived 50 percent black and spongy" and, later, that they were not Newtown Pippin apples but were of a variety known as White Pippin. A second shipment of 1920 bushels of apples was made by J.E. Robertson to the same purchaser on or about January 19, 1939, but since his principal had made complaint, Robertson resold the second shipment to other purchasers in Sweden and thereafter did not accept from Sheely Bros. any additional apples under the contract. Sheely Bros. sold to other purchasers the apples remaining in storage after Robertson had failed to accept them. The purchaser in Sweden made an advance payment through Robertson of \$2000 which the parties considered as partial payment of 41¢ per bushel on the 4888 bushels originally contracted for plus the 231 bushels contracted for later.

Robertson claimed damages of \$5,417.77 based upon alleged breach of warranty by Bream-Heeb Company which resulted in complainant's loss of brokerage plus expense and a loss of \$1,994.40 by Appelgren. The Bream-Heeb Company and Sheely Brothers claimed damages of \$2,190.60 against Robertson based on the unpaid purchase price of apples shipped and those which remained in storage and were subsequently resold. Van Bokkelen, Assignee, claimed damages against Bream-Heeb Company in the amount of \$3,213.83 because of failure to furnish apples in accordance with contract.

The apples were grown on trees owned by Sheely Bros. in their orchard located near Cashtown, Pa., originally planted in 1878. In 1917, approximately 1000 new trees were planted, no attention being paid to variety of the new trees because it was intended to rebud them with grafts from the original trees. This was done two years later. The new trees began producing about 7 or 8 years thereafter and these apples were from the new trees. Several witnesses testified that the apples were not Newtown Pippins; others that they were.

Attorney for W. Van Bokkelen, Assignee for A.B. Oscar Appelgren & Co., announced unpreparedness to proceed with the case. It was agreed that the Secretary might determine whether the original complaint had been filed within nine months from the date of accrual of the cause of action and, if so, some method would later be devised to accommodate the parties. The Swedish purchaser filed informal complaint within nine months, although in that complaint Bream-Heeb Co. was regarded as the seller, whereas it was clearly shown that it acted only as broker-agent for Sheely Bros.

Rulings included in Decision

1. The evidence failed to establish that the apples were of some variety other than Newtown Pippins. The experts did not agree as to the variety. The first lot exported was received from cold storage on or about December 30, 1939, and arrived at Gothenburg, Sweden, on or about January 24, 1940. The record showed the apples were in a non-refrigerated space in the boat, but beyond this it did not disclose how they were handled. The absence of further information as to how the apples were cared for during that 25-day period prevented the drawing of any conclusions as to the variety, based upon the extent of deterioration reported by the buyer.

2. The apples graded U.S. No. 1 as warranted. Federal-State of Pennsylvania certificate of inspection showed that the 1280 baskets and the 1920 baskets graded U.S. No. 1 and were of the sizes specified. The evidence indicated that the seller's

warranty as to grade had reference to the time of shipment from the Chambersburg Cold Storage warehouse, or, at most, delivery at ship side, Baltimore. The contract provided that shipments would be made during January and February, 1939.

3. The record showed that James E. Robertson and Bream-Heeb Co. acted as agents only for their respective principals, A.B. Appelgren & Sheely Bros., and no liability therefore attached to their transactions and no order could be entered against them. The complaint of James E. Robertson against Bream-Heeb Co. and the complaint of Bream-Heeb Co. and Sheely Bros. against James E. Robertson were therefore dismissed.

4. It was ordered that the complaint of W. Van Bokkelen, Assignee, be continued for further hearing. The informal complaint of Oscar Appelgren & Co. was sufficient to stop the running of the nine months' statute of limitations. The practice of accepting informal complaints for the purpose has been followed since the passage of the act in 1930. Provision should therefore be made for the offering of evidence unless W. Van Bokkelen, Assignee, recognizes that since the Bream-Heeb Co. acted as agent only, there would be no purpose in the further prosecution of that complaint.

S-2706, July 29, 1941, Docket 3949: (S.P.)

LOUIS SCHULTZ, DECKER, INDIANA v. TRUCKERS PRODUCE CO., INC.,
BUFFALO, N.Y.

Violation charged: Failure to account and pay the net proceeds of a truckload of cantaloups.

Principal point involved: Failure to remit net proceeds for sale of goods on consignment is a flagrant violation of section 2 of the act.

Order: Complainant awarded \$181.62, plus interest.

Outline of Facts

On or about August 23, 1940, complainant shipped a truckload of cantaloups, consisting of 218 crates, to Buffalo, New York, from Vincennes, Indiana. Respondent accepted the cantaloups and sold them, but thereafter failed and neglected to account for and pay to complainant the net proceeds derived from such sales. The amount of net proceeds realized by respondent from the sale of the cantaloups amounted to \$181.62.

A copy of the complaint was served upon respondent April 21, 1941, but no answer was filed.

Ruling included in Decision

Respondent's failure to account and transmit to complainant the proceeds of sales realized from the sale of complainant's canteloups was and is a flagrant violation of section 2 of the act. Complainant was therefore awarded reparation of \$181.62, plus interest.

S-2703, August 2, 1941, Docket 3299: (Hearing)

IDAHO SALES COMPANY, KIMBERLY, IDAHO v. THE RYAN POTATO COMPANY, MINNEAPOLIS, MINN.

Violation charged: Failure to pay the purchase price of two carloads of potatoes.

Principal points involved: Failure to pay contract purchase price was violation of section 2 of act; failure of respondent to prove alleged damages necessitated dismissal.

Order: Complainant awarded \$635.60, plus interest; respondent's countercomplaint dismissed.

Outline of Facts

During the early fall of 1938, respondent purchased from complainant two carloads of U.S. No. 1, Size A, Russet potatoes, at \$1.62½ and \$1.75 per cwt. delivered. The two carloads were shipped by complainant to respondent at Minneapolis. They conformed to the specifications of the contract and were accepted by respondent, who failed to pay any part of the purchase price.

Respondent filed a countercomplaint alleging that in September 1938 complainant contracted to sell to respondent 20 carloads of potatoes, 10 carloads at \$1.50 per cwt. and 10 carloads at \$1.45 per cwt., delivered at Minneapolis; that respondent ordered shipment of the potatoes and sold them at 10¢ per cwt. over the agreed sales price; that complainant failed to ship the potatoes and by reason of this failure to deliver respondent suffered a loss of 10¢ per cwt., or a total of \$720; and that a balance of \$166.77 was due respondent from complainant.

Rulings included in Decision

1. It is incumbent upon the party filing a complaint or countercomplaint to prove damages by a fair preponderance of the evidence. The evidence submitted by complainant showed the potatoes in the two cars shipped conformed to the specifications of the contract and were accepted by respondent. The evidence established that the parties contracted to buy and sell an additional 20 carloads of potatoes as alleged by respondent.

It also showed that complainant failed to deliver the 20 carloads of potatoes. However, respondent submitted no evidence in support of damages claimed and the countercomplaint was dismissed.

2. Respondent's failure to account to complainant for the net contract price of the two carloads of potatoes was a violation of section 2 of the act. Complainant was therefore awarded \$635.60, plus interest.

S-2713, August 6, 1941, Docket 3759: (S.P.)

MACEL SHELTON, OSWEGO, N.Y. v. MAURICE TEVELOV, AGAWAM, MASS.

Violation charged: Failure to pay for
300 bags of onions.

Principal point involved: Failure to pay
the agreed purchase price was in violation
of section 2 of the act.

Order: Complainant awarded \$181, plus
interest.

Outline of Facts

On or about January 22, 1940, complainant sold to respondent 300 50 lb. bags of Yellow Globe seed onions, at 55¢ per bag for 140 bags and 65¢ per bag for 160 bags, a total price of \$181, f.o.b. Oswego, N.Y., and respondent trucked the onions to Agawam, Mass. Complainant claimed that payment therefor had not been made and asked for an award in the amount of the purchase price.

Respondent claimed that he paid for the onions on January 22, and submitted photostatic copy of invoice bearing endorsement "Rec'd check of January 20, 1940 in payment" of 300 bags of onions, in the total price of \$181. Such payment was made by check dated January 20, 1940.

This was denied by complainant, who stated that on January 13 he sold to respondent 300 bags of onions for the agreed price of \$180; that, in making payment therefor, by check dated January 16, respondent deducted \$20, because of claimed inferior condition and quality due to frost injury, but that later respondent told complainant his previous deduction of \$20 was too great and he wished to return \$5 thereof; that on January 18, respondent purchased 320 bags at the agreed price of \$176, and that complainant received respondent's check, dated January 20, for \$181, which covered this lot of onions, plus the return of \$5.

Ruling included in Decision

Respondent's failure and refusal to account and pay to complainant the agreed price of the onions were in violation of section 2 of the act. Complainant's statement was accepted as the most probable version of what actually occurred, it appearing that the January 20 check was given in payment for the onions purchased on January 18, in the amount of \$176, plus the return of \$5 in connection with the January 13 purchase. Respondent had paid for the previous shipments one or two days after the sale and it was probable that his check of January 20 was for the previous shipment, rather than for the sale made on January 22. Furthermore, the respondent did not submit any statement in opposition to or denial of the complainant's opening statement of fact. Complainant was therefore awarded \$181, plus interest.

S-2715, August 7, 1941, Docket 3638: (S.P.)

HARRY M. DELLERMAN, LOS ANGELES, CALIF. v. RECCO & PANELLA, NEW CASTLE, PA.

Violation charged: Failure to pay for a carload of juice grapes.

K-5
D-12

Principal points involved: Since respondents were licensed, though not required to be licensed, they were subject to all conditions and penalties of act; complainant failed to prove grapes were merchantable.

Order: Complainant awarded \$46.29, plus interest; respondents' counterclaim dismissed.

Outline of Facts

On or about September 30, 1939, complainant sold to respondents, as set forth in exchange of wires quoted in the decision, a carload of juice grapes, consisting of 349 lugs of Malvaise, 239 of Zinfandel and 585 of Muscat varieties, shipped from Fresno, California on September 22, at 95¢ per lug, or \$1114.35, less transportation charges, a net of \$574.10. Respondents were promptly notified of arrival at destination on October 3 and promptly complained of the quality and condition of the grapes, R.P.I.A. inspection made on that date indicating that approximately 1/5 of the berries of all grapes in the car, which was then 1/4 to 1/3 unloaded, were raisining and raisined. Disposition was made of the salable portion, but respondents failed to pay complainant any portion of the purchase price, for which complainant asked an award.

Respondents claimed a loss of \$47.31, because of failure of the grapes to comply with contract, and filed a counterclaim for that amount. Attention was particularly called to the fact that the car had been in transit several days before it was sold to them.

The shipper from whom complainant purchased the car identified the shipper's weight certificate, included in the record to show the number of lugs and that the weight of the shipment was 35,716 lbs., and testified that the grapes were fully mature and that no decay was found at time of loading. No other proof was offered to show condition at time of shipment.

Information on record in the Department shows that respondents are, and during all times mentioned in this complaint were, only retail dealers and therefore not required to be licensed. They voluntarily applied for and received a license on November 1, 1938, which terminated at the end of one year. Renewal was not required because investigation showed their business did not require them to have one.

Rulings included in Decision

1. Having obtained a license, respondents voluntarily placed themselves within the jurisdiction of the act for all purposes, since it is a well known legal maxim, or principle of law, that "he who has the advantage should also bear the disadvantage." Since any order issued refers directly back to the time of violation of the provisions of the act while the respondents were licensed, they must be subject to all of its conditions and penalties.

2. Respondents did not purchase any particular grade of juice grapes and the record showed that complainant notified them of the date of shipment when the original offer was made on September 27 and filed diversion order to respondents immediately upon receipt of their wire of September 30, agreeing to purchase the shipment. Complainant therefore was required to deliver merchantable juice grapes.

3. Complainant failed to prove that a carload of merchantable grapes was tendered to respondents. R.P.I.A. certificate covering inspection made on the day of arrival at destination showed 18 to 20% raisining berries, plus 10% raisins, dry stems, and 4 to 5% shattering of berries. Two days later this same inspector reported that lugs taken from near the bunker in the B end of the car were wet, slack 1 to 2 inches and showed 10% decay. Six days after arrival a health officer for the city of New Castle, Pa. condemned 135 lugs because of decay. The record indicated quite conclusively that a considerable portion of the badly decayed condition found in the ends of the car was present on arrival of the shipment at destination.

4. The action of respondents in disposing of the salable portion of the load after notifying complainant of their poor condition, constituted a sale for the account of complainant. The total sum of \$585.65 was realized from that sale, and, after the deduction of \$539.35 for freight charges, left net proceeds of \$46.29, for which amount, plus interest, complainant was awarded reparation.

5. Respondents failed to prove that they were damaged as the result of a failure to receive grapes which met contract requirements. Their counterclaim was therefore dismissed.

S-2716, August 7, 1941, Docket 3723: (Hearing)

SALVATORE BATTAGLIA, LOS ANGELES, CALIF. v. HUB CITY PRODUCE CO., PHARR, TEXAS.

Violation charged: Failure to deliver a truckload of tomatoes in compliance with contract.

Principal point involved: Tomatoes approximately 34% U.S. No. 1 quality considered substantial compliance with contract calling for tomatoes approximately 40% U.S. No. 1 quality.

H-5
H-30
H-32

Order: Complaint dismissed.

Outline of Facts

After preliminary negotiations beginning on January 26, 1940, complainant purchased from respondents one truckload of tomatoes at \$1.50 per lug, to be shipped by truck, procured by complainant, from Pharr, Texas, to Los Angeles, Calif., concluding with telegrams on January 27, reading as follows: Respondents to complainant - WILL GIVE SAME TOMATOES THAT YOU SAW CANT GUARANTEE 85 PERCENT BUT WILL BE GOOD QUALITY. WILL HAVE THEM U S INSPECTED HERE. WILL HAVE TO KNOW SOON AS OTHER CUSTOMERS WAITING; and complainant to respondent - SATISFACTORY PER YOUR WIRE SHIP SUNDAY WIRE NUMBER LUGS SIZES WILL WIRE MONEY MONDAY HAVE WIRED HURLEY DALLAS FOR TRUCK SUNDAY **. On January 28, respondents wired complainant, with reference to condition and quality: TOMATOES RUNNING 60 PERCENT PINKS AND BREAKERS NO INSPECTION SERVICE SUNDAY WILL HAVE INSPECTION TOMORROW; and on the 29th; 74 5/5 133 5/6 593 6/6 APPROXIMATELY 40 PERCENT USONE QUALITY. WELL MATURED DUE BEING IN BOXES SO LONG. TRUCK WAITING.*** Complainant wired funds to cover the purchase price, but sought an award of damages on the ground that the tomatoes did not comply with contract specifications.

Government inspection at destination at time of arrival showed the tomatoes to be 50% green, 40% turning, 10% ripe, with many of those ripe and turning being somewhat soft; 25% decay, ranging from 10% to 50%; 40% showing bruised and shriveled areas; and all showing characteristics of stock which had been subjected to low temperatures. It was shown by witnesses and exhibits that the tomatoes, after reconditioning, broke down on being placed at a temperature of 70° for the purpose of ripening, and that the entire load was dumped.

Respondents did not introduce any evidence to dispute the evidence of complainant as to condition of the stock at the point of destination, but did introduce evidence as to quality and condition at shipping point, and other evidence to show that the tomatoes had not been subjected to destructively low temperatures prior to delivery for shipment. The best evidence as to condition at time of shipment was found in the inspection records of the Federal-State Inspection Service. The inspection report, including the inspector's notes made at the time of shipment from Pharr, showed the tomatoes to have been U.S. No. 2 grade, including about 34% U.S. No. 1 quality, no decay, and having approximately 8% cuts and worm injury and bruises.

Rulings included in Decision

1. The telegraphic correspondence, which constituted the contract, for the purpose of determining the final offer and acceptance, showed that the respondents were obligated to deliver at Pharr, Texas, a truckload of 80% pinks and breakers, approximately 40% U.S. No. 1 quality.

2. The tomatoes delivered by respondents at Pharr were in substantial compliance with the terms of the contract. The evidence of respondents, which related directly in point of time and place to the goods as delivered for shipment, must be given more weight than that of the complainant, which was obtained by observation of the goods at destination, after a truck haul from Pharr to Los Angeles. Even though it was shown by the shipping point inspection report that respondents failed by 6% to include as many U.S. No. 1 quality tomatoes in the shipments as approximated in the offer of sale, this fact did not tend to show any apparent or latent defect which could have contributed to the complete breakdown and deterioration of the goods while in transit. Nor, since the offer used the words "approximately 40% U.S. No. 1 quality", was it believed that the delivery of approximately 34% U.S. No. 1 quality tomatoes could be considered a breach of contract. The complaint was therefore dismissed.

S-2718, August 11, 1941, Docket 3766: (S.P.)

WILLIAM LESS & CO., NORTH ADAMS, MASS. v. W.H. MARTIN, BANGOR, MAINE.

Violation charged: Failure to deliver a carload of potatoes in accordance with contract.

F-1 Principal point involved: Granting of allowance to buyer amounted to a new contract, with no warranty as to grade or condition.

Order: Complainant awarded \$19.90, plus interest.

Outline of Facts

On March 27, 1940, through a broker, respondent sold to complainant one carload (400 100-lb. sacks) of U.S. No. 1 grade, 2" minimum, size A, Mountain potatoes, at \$2.09 per cwt. delivered North Adams, Mass., or a total price of \$836, less freight charges of \$165.80, making a net of \$670.20. Respondent's draft for that amount was paid by complainant. Shipment was made from loading point in Maine, and the car arrived at North Adams on April 2. On that day the broker wired respondent LESS REPORT PRACTICALLY ALL SACKS SHOWING OLD FROST NECESSARY RECONDITION INSISTS DIME ALLOWANCE **. Respondent asked the broker to attempt to adjust for a 5¢ allowance, and when the broker wired him again, saying 10¢ was the best he could do, respondent wired ACCEPT LESS NORTH ADAMS WILL REDUCE DRAFT IN THE MORNING. Later the broker wrote respondent, asking for a further allowance, which respondent did not consent to. Complainant then filed this complaint, asking for an award of reparation.

On April 8, complainant obtained Federal inspection and on April 19 he obtained inspection by the Railroad Perishable Inspection Agency. The certificates evidencing the two inspections substantially agreed. The potatoes were not U.S. No. 1 grade due to grade defects averaging about 50%, consisting mostly of internal browning.

Rulings included in Decision

1. The agreement whereby the respondent granted an allowance of 10¢ per bag amounted to a new contract, in which there was no warranty as to grade or condition. The complainant at that time had inspected the potatoes and had had an opportunity to make a more complete inspection if he so desired. It appeared that the defects were such that the complainant could have discovered them by the simple expedient of cutting representative samples of the potatoes. Since there was an average of 50% internal browning on

April 8, it was clear that a substantial amount was present on April 2, when the complainant inspected the potatoes. The only way complainant could possibly avoid the performance of his contract would be by showing that there were latent defects which were not discoverable at the time of his inspection. This he failed to do. His claim that the potatoes were infected with net necrosis was not substantiated in the record.

2. Respondent violated the act by failing truly and correctly to account to the complainant for the sum which he agreed to grant as an allowance on the shipment of potatoes, but complainant failed to prove that respondent was liable for reparation in excess of the amount due as an allowance of 10¢ per bag, amounting to a total of \$40 on 400 bags. However, complainant actually was required to pay only \$145.70 freight instead of \$165.80, so respondent was entitled to a credit of the difference of \$20.10. Complainant was awarded \$40 less \$20.10, or \$19.90, plus interest.

S-2721, August 22, 1941, Docket 3406: (Hearing)

S. KEMP CO., HAZLEHURST, MISS. v. GRUBER & MINTZER, NEW YORK, N.Y.

Violation charged: Failure to pay for two carloads of tomatoes.

Principal points involved: Trade talk not an express warranty; having accepted tomatoes, not in suitable shipping condition, buyer must pay diminished price; development of Soil Rot and Phoma Rot during 5-day period in transit, averaging 3% at destination and presence of numerous dark brown spots averaging 20%, indicated tomatoes not in suitable shipping condition.

F-39
H-36
D-4x

Order: Complainant awarded \$191.82, plus interest.

Outline of Facts

On or about June 3, 1939, respondents' buying agent purchased from complainant 625 lugs of tomatoes at \$1.05 per lug, a total of \$656.25, and on June 5, 675 lugs at 80¢ per lug, a total of \$540, both prices f.o.b. Hazlehurst, Miss. The first car arrived at New York City on June 7 and was accepted and sold by respondents at auction for net proceeds of \$440.76. They deducted freight, inspection and dock river charges totaling \$248.94, and tendered to complainant the balance of \$191.82, which complainant refused. The second car arrived at Jersey City on or about June 9. Upon oral instructions from an unknown person the carrier held the car and the parties exchanged telegrams in an endeavor to reach an

agreement with respect to a reduction in the agreed price from 80 to 55¢ per lug, but no agreement was reached and the tomatoes were ultimately abandoned to the railroad carrier. Complainant asked for an award in the amount of the purchase price of the two cars.

Respondents claimed that the tomatoes did not conform to the seller's warranty, and denied acceptance of the second carload.

Complainant's witness stated respondents' agent inspected the tomatoes in the first car; the agent testified he had instructions to buy nothing but the best quality and complainant in effect warranted the stock to be bang-up quality.

Federal-State inspection of the first car at Hazlehurst on June 3 showed that the stock was then "mature green, fairly clean, fairly well to well formed, fairly smooth to smooth, firm, less than 1% decay. Grade defects within tolerances" and graded U.S. No. 1. Inspection of the second car on June 5, showed the stock "mature green, fairly clean, mostly well formed, some fairly well formed, mostly smooth, some fairly smooth, firm, no decay. Grade defects average within tolerances" and graded U.S. No. 1.

Standard Inspection Service inspector at New York City testified that on June 7 he found in the first car an average of 12 to 13% "turning," 1 to 2% "firm ripe," and the balance, 85% green, and that the car did not grade U.S. No. 1 on account of decay and on account of the amount of scars and blemishes." His certificate showed an average of 25 to 26% minor, and 11 to 12% serious scars and blemishes. He noted that "many wrappers" were "wet, due to decay," which averaged 9 to 10%, referred to as "soft rot." On June 10, in the other car, Federal inspector at Jersey City found that "approximately 75%" of the tomatoes were "mature green, 15% turning, 5% ripe and firm. Averaging 6% decay, consisting of Soil Rot and Phoma Rot, various stages. Ranging from 15 to 30%, averaging approximately 20% condition defects consisting of tomatoes affected by numerous dark brown spots scattered over surface of tomatoes and shoulder scars." The shipment then failed to grade U.S. No. 1 only account decay, dark brown spots and shoulder scars.

Rulings included in Decision

1. Nothing was said which amounted to an express warranty as to quality of the tomatoes. The agent's statement to Kemp that "bang up" stock was required, and his inquiry as to whether the tomatoes would "carry," in connection with Kemp's answering statements, seemed to have been a part of the trade talk of the negotiating parties. The complainants knew, however, that the tomatoes were being purchased for shipment to, and resale at, New York City. The complainants knew that the tomatoes would have to be in "suitable shipping condition" for the purpose stated.

2. The evidence was insufficient to show that respondents, by ordering the second car held at Jersey City, could be held to have constructively accepted it. Since there was not a constructive acceptance of that carload, the refusal of the respondents to take possession was a rejection thereof, but not a rejection without reasonable cause. There was nothing in the record to indicate that the extent of decay disclosed by the inspection made of the tomatoes at destination was caused by the manner in which the shipments were handled in transit. It was believed that the development of Soil Rot and Phoma Rot during transit, averaging 6% at destination, for the five-day period, June 5 to June 10, and the presence of "numerous dark brown spots scattered over the surface of the tomatoes" ranging from 15 to 30% and averaging 20%, was evidence of lack of suitable shipping condition.

3. With reference to the first car, although lack of suitable shipping condition was not alleged by respondents in their answer as a defense or partial defense, it was shown by the evidence. At loading point on June 3, there was "less than 1% decay, and four days later soft rot developed, averaging from 9 to 10%. Having accepted the tomatoes, although they were not in suitable shipping condition, respondents must pay complainants the diminished price. Complainant was awarded \$191.82, plus interest.

S-2723, August 23, 1941, Docket 3719: (S.P.)

SCANDRETT PACKING CO., SANGER, CALIF. v. D.L. PIAZZA BROKERAGE CO., MINNEAPOLIS, MINN.

Violation charged: Failure truly and correctly to account for 10 carloads of grapes handled on joint account.

F-11 Principal points involved: The rule as to
F-12 divisibility of contracts is one of interpretation and does not apply where parties manifest different intention; a promise modifying the agreement, but without consideration, is not enforceable.

Order: Complainant awarded \$34.91.

Outline of Facts

On or about July 18, 1939, through a broker, the parties to the complaint entered into a joint account agreement whereby complainant was to ship from Sanger, California to respondent at Minneapolis, 10 carloads of grapes at a guaranteed cost of 50¢ per box f.o.b. California loading point, the memorandum of sale stating: "When freight and icing charges and all other charges incident to transportation, also guarantee less deposit of \$100, cartage and additional auction charges have been deducted, the

profits are to be split 50-50 between buyer and seller after all the 10 cars are shipped and sold ***." The first car was to be shipped on August 5. On July 24 complainant wired the broker that "***50% overage should be paid at time of sale." The broker wired respondent that "***shipper insists wants check each car his share of profit time car sold" and respondent answered "Okay will mail checks profit each car after sold***." Shipments were made and the cars were accepted by respondent, who did not remit complainant's share of profits on each car at the time sold. Complainant contended that respondent, by agreeing to mail checks for profits on each car, as sold, agreed to account for each car as a separate unit, and asked for an award of reparation on that basis.

Respondent rendered an accounting after all 10 cars were sold in which it showed that profits were made on 5 cars but they were more than offset by losses on the remaining cars. Respondent asserted that by agreeing to so mail checks he simply agreed to change the time of payment, but that he did not thereby agree to change the method of accounting.

Rulings included in Decision

1. The original contract, under the terms of which complainant was bound to deliver the grapes to respondent and respondent to pay to complainant 50¢ per box plus 1/2 of any profits realized on the 10 carloads as a whole, was the only enforceable agreement. Under the new agreement respondent promised to send the checks before the time it would have had to send them under the original contract. If the contention of the complainant as to the interpretation of this agreement were correct, respondent agreed to make payment which would possibly have been greater than those which it would have had to make under the original contract, and which could not possibly have been less than the payments under the original contract. In exchange for this promise of respondent, complainant did nothing and promised nothing. It did not do any act or make any promise to do anything that it was not already bound to do under the original contract. There was no possibility that the respondent would receive any benefit as a result of his promise. Finally, complainant did not suffer any detriment as a result of his reliance upon respondent's promise. Thus it was apparent that the agreement by the respondent to pay for each car at the time it was sold was not supported by a consideration and was not enforceable.

2. Consideration was given as to whether the contract was divisible. Since there was a definite price per crate and a definite number of crates in each car, the purchase price of each car was easily and definitely ascertainable. Such an arrangement standing alone would usually imply a divisible contract in which each car would be treated as a single unit to be accepted and paid for as a separate sale. The rule that such circumstances indicate a divisible contract is merely a rule of interpretation, however, and does not apply if the parties have manifested a contrary or different intention. In this case, by agreeing that the profits were to be split "after all the ten cars are shipped and sold" the parties clearly indicated that this phase of the transaction was to be treated on the basis of a single contract for all ten cars. Consequently the rule that under such circumstances a divisible contract is intended does not apply, for the reason that a different intention was manifested by the parties.

3. Respondent failed truly and correctly to account in respect to the shipment of 10 carloads of grapes. The parties in their negotiations and in their pleadings stated that the consignment was for 10 carloads, but complainant listed 11 cars as shipped and respondent accounted for 11 cars in its accounting contained in the record. Since neither party objected, the accounting on the basis of 11 cars was accepted. Five cars resulted in net profits of \$482.10 and six resulted in a net loss of \$538.18. Respondent collected from the carrier claims amounting to \$128.74. Thus, the profit on five cars plus \$128.74 amounted to \$610.84, or \$72.66 more than the losses on the remaining six cars, to one-half of which, or \$36.33, complainant was entitled. Respondent paid complainant \$1.42 on one car, leaving \$34.91 due complainant. For which amount complainant was awarded reparation.

S-2732, Sept. 27, 1941, Docket 3942: (S.P.)

C.R. SHEFVELAND, ASSIGNEE OF J.J. CLARKIN, doing business as NORTHWESTERN BROKERAGE CO., ST. PAUL, MINN. v. C.S. MAYES & SONS, MUSKOGEE, OKLAHOMA.

Violation charged: Failure to account for respondent's share of the loss incurred on two shipments of strawberries handled on joint account.

Principal point involved: As respondent was not subject to license it could not be held to have violated section 2 of the act.

Order: Complaint dismissed.

Outline of Facts

Complainant alleged that, on May 9 and 10, 1938, respondent consigned to complainant's assignor two carloads of strawberries, to be sold for the joint account of the complainant's assignor and respondent; that a total loss of \$582.44 was sustained on the two shipments, for one-half of which an award was sought.

A copy of the complaint was served on respondent on April 12, 1941, but no answer was filed.

Ruling included in Decision

Respondent was not subject to the provisions of the Perishable Agricultural Commodities Act. Although the complaint alleged that respondent was licensed at the time of the transactions involved, Departmental records showed that respondent has not been licensed since June 28, 1937. It was clear that, so far as the evidence contained in this record was concerned, respondent was not a commission merchant or a broker. There was no allegation or proof that these strawberries, or any other commodities shipped in interstate commerce by respondent, were other than commodities of its own raising. Under the circumstances, respondent could not be held to be a violator of section 2 of the act, since that section applies only to commission merchants, dealers, or brokers. The complaint was therefore dismissed.

S-2734, October 2, 1941, Docket 4020: (S.P.)

S.D. EVELOFF CO., PHILADELPHIA, PA. v. DAVID GOLDSAMT, INC., NEW YORK, N.Y.

Violation charged: Failure to pay agreed price for a carload of cauliflower.

M-4 Principal point involved: Failure to pay balance due on purchase was in violation of the act.

Order: Complainant awarded \$24, plus interest.

Outline of Facts

On or about January 27, 1941, respondent's agent, after inspecting the cauliflower, purchased a carload which had been shipped from Arizona to Philadelphia. The purchase was made at \$1.75 per crate, or \$476.22 f.o.b. Philadelphia, for diversion to New York City. The cauliflower was accepted by respondent at New York and the sum of \$452.22 paid on the account, leaving an unpaid balance of \$24, for which complainant asked an award.

A copy of the complaint was served on respondent on July 19, 1941, but no answer was filed. However, on May 7, 1941, respondent wrote to the Department, stating that the matter would be amicably settled as soon as its salesman returned from a trip out of town. Settlement was not made.

Ruling included in Decision

The failure of respondent to pay complainant the balance of \$24 was in violation of the Perishable Agricultural Commodities Act. Complainant was awarded \$24, plus interest.

S-2736, October 2, 1941, Docket 3810: (Hearing)

JAMES TOZZI & COMPANY, STOCKTON, CALIF. v. H. RUBENSTEIN & CO., MILWAUKEE, WISCONSIN.

Violation charged: Failure to pay for a carload of peaches.

Principal point involved: Greater weight should be given to Federal-State inspection certificate than to uncorroborated testimony of respondent.

Order: Complainant awarded \$574.40, plus interest.

Outline of Facts

On or about August 3, 1940, through a broker, complainant sold to respondent one carload of U.S. Extra No. 1 Hale peaches, consisting of 1008 lugs at 55¢ per lug, f.o.b. shipping point California, plus a precooling charge of \$20, making the total sales price \$574.40. Complainant on August 3 diverted the peaches to Milwaukee, Wisconsin, where they were due to arrive about August 4, and where they were accepted by respondent, and shipment later made to Detroit, Michigan, for sale at auction. Complainant asked for an award in the amount of the purchase price.

Respondent filed an answer, alleging that the peaches were in poor condition when they arrived in Milwaukee, and could not have been at the time shipped from California "U.S. Extra No. 1"; that respondent was unable to use the peaches and therefore had them shipped to Detroit where they were sold at auction, netting \$325.19.

Deposition of James Tozzi supported the material allegations in the complaint, and attached to the deposition was a Federal-State inspection certificate, showing that the peaches graded U.S. Extra No. 1.

Rulings included in Decision

1. The peaches were U.S. Extra No. 1, as shown by Federal-State inspection certificate. Statements in the inspection certificate are prima facie evidence and greater weight should be given to the certificate than to the uncorroborated testimony of respondent. Furthermore, if it were believed that the inspector was in error, an appeal inspection could have been secured. Also the condition of the peaches might have materially changed between the date of sale and the time they were finally resold at auction in Detroit, Mich.

2. Respondent's failure to make payment was in violation of the act. Complainant was awarded \$574.40, plus interest.

S-2737, October 2, 1941, Docket 3886: (Hearing)

L. GILLARDE COMPANY, CHICAGO, ILL. v. H. RUBENSTEIN & COMPANY, MILWAUKEE, WISCONSIN.

Violation charged: Failure to pay for a carload of grapes.

Principal point involved: Failure to pay purchase price was in violation of section 2 of act.

Order: Complainant awarded \$527.65, plus interest.

Outline of Facts

On or about October 14, 1940, complainant sold to respondent one carload of Tokay grapes, consisting of 1,115 lugs, at \$1 per lug, f.o.b. Chicago, or a total net price of \$527.65, based on inspection and acceptance on track Chicago. Complainant diverted the car from Chicago to Milwaukee, Wis. and the grapes were accepted by respondent, who failed to pay for them. Complainant asked for an award for the amount of the purchase price. Deposition of the Vice President of the complainant company, with the exhibits attached, supported the material allegations of the complaint, and showed in effect that the grapes conformed to the contract of purchase and sale.

Ruling included in Decision

Respondent violated section 2 of the act by failing to account to complainant in respect to a transaction involving the shipment of a perishable agricultural commodity in interstate commerce. Complainant was therefore awarded \$527.65, plus interest.

S-2738, October 2, 1941, Docket 3913: (Hearing)

ANDREWS BROS. COMPANY, LOS ANGELES, CALIF. v. H. RUBENSTEIN & CO., MILWAUKEE, WISCONSIN.

Violation charged: Failure to pay the full contract purchase price for a carload of oranges.

Principal point involved: Failure to pay purchase price was in violation of section 2 of act.

Order: Complainant awarded \$873.59, plus interest.

Outline of Facts

On or about January 30, 1941, complainants sold to respondent one carload of Buddy Brand California Navel Oranges, consisting of 462 boxes, at the total contract price of \$973.59, shipped from Riverside, California to Milwaukee, Wisconsin. The oranges were inspected and accepted on track at Milwaukee on January 30. Respondent paid complainants \$100, and complainants asked for an award in the amount of \$873.59. Deposition of Fred Andrews supported the material allegations of the complaint.

Ruling included in Decision

Respondent violated section 2 of the Perishable Agricultural Commodities Act in failing to make full payment for the oranges. Complainants were awarded \$873.59, plus interest.

S-2739, October 2, 1941, Docket 3948: (Hearing)

L. GILLARDE COMPANY, CHICAGO, ILLINOIS v. H. RUBENSTEIN & CO., MILWAUKEE, WISCONSIN.

Violation charged: Unjustified rejection of a carload of grapes.

Principal point involved: Preponderance of evidence showed that grapes conformed to specifications.

Order: Complainant awarded \$235, plus interest.

Outline of Facts

On or about October 14, 1940, complainant sold to respondent one carload of seedless grapes, consisting of 1175 lugs at \$1 per lug, or \$612.87 f.o.b. Chicago, Illinois. Complainant diverted the grapes from Chicago, and tendered the carload to respondent at

Milwaukee, Wisconsin, but respondent failed and refused to accept it. Following the rejection, complainant made resale at the net price of \$377.87, resulting in a net loss of \$235, for which an award was requested.

No answer to the complaint was filed by respondent, but an answer was filed in the disciplinary case against the respondent, denying a violation of the act in connection with this shipment.

Rulings included in Decision

1. Deposition of the Vice President of complainant company was clear and definite and supported by exhibits definitely showing that the grapes were sold on the basis of "inspection and acceptance track Chicago."

2. Complainant showed by a fair preponderance of the evidence that the grapes conformed to the specifications of the contract of purchase and sale, and the rejection by respondent was without reasonable cause. Complainant was awarded \$235, plus interest.

S-2741, October 4, 1941, Docket 4013: (S.P.)

GUY C. DEFFKE, EATON, COLORADO v. MCKENZIE BROKERAGE COMPANY, SPRINGFIELD, MO.

Violation charged: Failure to pay for a carload of potatoes.

Principal point involved: Failure to pay purchase price was in violation of section 2 of act.

Order: Complainant awarded \$133.20, plus interest.

Outline of Facts

On or about January 28, 1941, complainant sold to respondent a carload of potatoes at 85¢ per cwt. or \$133.20 delivered Springfield, Mo. Shipment was made from Lucerne, Colorado to Springfield, Mo., and the potatoes were accepted by respondent, who failed to pay for them. Complainant asked for an award in the amount of the purchase price.

The respondent, on July 15, 1941, admitted the allegations in the disciplinary complaint, including this transaction, and waived an oral hearing.

Ruling included in Decision

Respondent failed, in violation of section 2 of the act, truly and correctly to account to complainant for any part of the purchase price of the potatoes. Complainant was therefore awarded \$133.20, plus interest.

S-2742, October 4, 1941, Docket 4014: (S.P.)

MATHEWS PRODUCE COMPANY, GREELEY, COLORADO v. MCKENZIE BROKERAGE CO., SPRINGFIELD, MO.

Violation charged: Failure to pay the full contract price for 4 carloads of potatoes.

Principal point involved: Failure to pay total purchase price was in violation of section 2 of act.

Order: Complainant awarded \$409.80, plus interest.

Outline of Facts

On or about January 7, 1941, complainant sold to respondent four carloads of potatoes at 80¢ per cwt. for the potatoes in three cars and at 80¢ and 85¢ per cwt. for the potatoes in the other, delivered, less freight, heater service, and brokerage. Shipment was made from Greeley, Colorado and the potatoes were accepted by respondent, who failed to pay a balance of \$409.80 on the purchase price.

On July 15, 1941, respondent admitted the allegations in a disciplinary complaint, including this transaction, and waived an oral hearing.

Ruling included in Decision

Respondent failed, in violation of section 2 of the act, truly and correctly to account to complainant for the total purchase price of the potatoes. Complainant was awarded \$409.80, plus interest.

S-2743, October 4, 1941, Docket 4015: (S.P.)

ALFRED HVIDSTEN, STEPHEN, MINN. v. MCKENZIE BROKERAGE COMPANY, SPRINGFIELD, MO.

Violation charged: Failure to pay for a carload of potatoes.

Principal point involved: Failure to pay any part of purchase price was in violation of section 2 of act.

Order: Complainant awarded \$205.20 plus interest

Outline of Facts

On or about February 18, 1941, complainant sold to respondent a carload of potatoes at 57¢ per cwt. or \$205.20 f.o.b. Stephen, Minn. Shipment was made from Stephen, Minn. to Springfield, Mo., and the potatoes were accepted by respondent, who failed to pay for them. Complainant therefore asked for an award for the amount of the purchase price.

The respondent, on July 15, 1941, admitted the allegations in a disciplinary complaint, including this transaction, and waived an oral hearing.

Ruling included in Decision

Respondent failed, in violation of section 2 of the act, truly and correctly to account to complainant for any part of the purchase price of the potatoes. Complainant was therefore awarded \$205.20, plus interest.

S-2744, October 9, 1941, Docket 3695: (Hearing)

E.M. SAWYER, BELCROSS, N.C. v. PASKOFF BROTHERS AND COMPANY, PITTSBURGH, PA.

Violation charged: Failure to account for the full purchase price of three carloads of potatoes.

Principal points involved: For carload accepted buyer bound to account in accordance with contract price; contract having contemplated diversion, buyer could make inspection at ultimate destination; potatoes in two cars not in suitable shipping condition.

Order: Complainant awarded \$402.75, plus interest.

Outline of Facts

On or about July 5, 1940, complainant sold to respondent three carloads of U.S. No. 1 grade potatoes at \$1.15 per bag. or \$276 per carload, f.o.b. Belcross, N.C. Shipment was made to respondents at Berkley, Va., where the cars were diverted by respondents to Page, W.Va., and from there to Pittsburgh, Pa. On July 9, upon receipt of shipping point inspection certificates, invoices and bills of lading, respondents immediately sent complainant a check in payment for the cars, but on July 15, when the last two cars arrived in Pittsburgh, respondents wired that these two cars arrived heavily diseased, and that they were securing Government inspection and would handle

for complainant's account. Respondents stopped payment on the check issued July 9 and subsequently tendered a check for \$142.10, the net proceeds of sale of the three carloads. This check was refused by complainant, who asked for an award in the amount of the full purchase price.

Federal-State certificates of inspection at shipping point showed the three carloads graded U.S. No. 1. Official inspections of the last two cars on July 15, the date of arrival at Pittsburgh, showed that the potatoes did not then grade U.S. No. 1. The condition of one car was shown as "When free from decay stock is firm. In 20% of samples no soft rot, in 70% of samples less than 1 to 3%, and in 10% of samples 5%, averaging 2% for lot. Decay is Slimy Soft Rot and wet type Fusarium Rot generally following Late Blight Tuber Rot. In addition irregularly in most sacks from 10 to 25% affected with Late Blight Tuber Rot." In the other car it was shown as "When free from decay stock is firm. In 10% of sacks no soft rot; in 60% of samples 1 to 4% soft rot; in 30% of samples 5 to 10% soft rot, average 4%. Decay is Slimy Soft Rot and wet type Fusarium Tuber Rot following Late Blight Tuber Rot. In addition 3 to 20%, average approximately 12% Late Blight Tuber Rot." The record also contained certificates of the Pittsburgh Department of Public Health which showed that 139 bags of potatoes from these two cars were condemned as unfit for food and were consigned to the dump.

An expert plant pathologist testified that Late Blight Tuber Rot is a field disease; that it does not spread from one potato to another during transit; and that the disease, in order to be present in potatoes at destination, must have been present, in substantially the same amount, at shipping point, although it may have been in a latent form and not apparent to an inspector at shipping point. He also testified that, although late Blight Tuber Rot, in its earlier stages, is not always apparent on the potato itself, it is easily discernible on the leaves of the potato plant in the field before the potatoes are dug. Complainant submitted depositions stating complainant's potato crop was examined from time to time by the witnesses and that there was no evidence of the existence of Late Blight Tuber Rot or any other disease or defect.

Rulings included in Decision

1. Respondents did not correctly account to complainant for the first carload of potatoes, as there was no evidence in the record that this shipment was ever rejected by respondents. It arrived at Pittsburgh on July 11, but no complaint was made concerning its condition, even though an inspection, made the day of its

arrival, showed the potatoes to be in poor condition. Moreover, this shipment was not mentioned in the wire of July 15, by which respondents informed complainant that the two other cars in question were being sold for his account. In the absence of convincing evidence to the contrary, it must be presumed that respondents accepted the potatoes in this car and they are bound to account to complainant in accordance with the contract price. Complainant was therefore awarded \$276 plus interest on this car.

2. The contract contemplated the diversion of the goods from Berkley, indicating that it was intended by the parties that inspection as provided in the regulations ("The Buyer has the right of inspection at destination ... for the purpose of determining that the produce shipped complied with the terms of the contract or order at time of shipment...") could be made at the ultimate destination of the shipments. For the same reason, as well as from the fact that other shipments of potatoes purchased from the complainant by the respondents had been in transit for a similar period of time before inspection, and because potatoes are not a highly perishable commodity, it was concluded that the inspection at Pittsburgh on July 15 was made within a reasonable period of time.

3. The potatoes in the last two cars were not in suitable shipping condition. The inspection certificates issued at Pittsburgh showed that the potatoes had abnormally deteriorated between the time of shipment and the time of arrival at Pittsburgh, and there was nothing in the record to show that they were in transit an unreasonable length of time or that the shipments were improperly handled. In view of all the evidence and giving the Federal inspection certificates issued at Pittsburgh the weight they deserve, it was concluded that the evidence preponderantly showed the existence of Late Blight Tuber Rot in the two shipments.

4. On July 15, respondents properly and with reasonable cause undertook the sale for complainant's account of the potatoes shipped in the last two cars. The act of diversion was obviously contemplated in the contract of purchase, as the potatoes were sold "for diversion on the respondents' order," so that it was insufficient to constitute an acceptance, and the act of payment could not be interpreted as a waiver of the respondents' right to inspect the potatoes and reject them should it be discovered that a latent defect, rendering them unsuitable for shipment, existed at the time of purchase. Complainant was awarded the net proceeds of resale of the two cars, \$126.75.

S-2745, October 9, 1941, Docket 3991: (S.P.)

PAUL P. SCHOENBURG, PHOENIX, ARIZONA v. COOPERMAN FRUIT CO.,
MINNEAPOLIS, MINN.

Violation charged: Unjustified rejection
of a carload of lettuce.

Principal point involved: Lettuce was of
considerably better grade than that called
for in contract.

Order: Complainant awarded \$493.90, plus interest.

Outline of Facts

On or about February 6, 1941, complainant sold to respondents a carload of 85% U.S. No. 1 lettuce, for the net price of \$551.85, which included \$30 top ice, f.o.b. El Centro, Calif. Shipment was made on the same day but the car was rejected by respondent at Minneapolis. Complainant endeavored to make resale in Minneapolis, but was unable to do so and therefore diverted the car to Chicago, Ill., where a net loss of \$496.93 was sustained on resale. Complainant asked for an award of \$496.93.

Respondent claimed that the lettuce did not conform to specifications of the contract, wiring complainant on the day of arrival "arrived and is satisfactory except very ripe and dirty," and later "Federal-State inspection today shows 83 percent USOne 3 percent slimy decay."

Federal-State inspection at El Centro, Calif. on February 6, 1941 showed that the lettuce graded U.S. No. 1. No copy of any certificate of inspection at Minneapolis on the day of arrival of the car was submitted. Investigation failed to disclose that a certificate was issued as represented.

Ruling included in Decision

The lettuce was of considerably better grade than that called for in the contract of sale and respondent's rejection was in violation of section 2. Complainant was awarded \$493.90, plus interest.

S-2747, October 15, 1941, Docket 3739: (Hearing)

D. B. BRUNO, INC., JACKSONVILLE, TEXAS v. DAVIS BROS., CHICAGO, ILLINOIS.

Violation charged: Failure to pay for two carloads of tomatoes.

Principal point involved: Failure to pay any part of contract purchase price was in violation of section 2 of act.

Order: Complainant awarded \$910, plus interest.

Outline of Facts

On or about June 21, 1940, complainant sold to respondent two carloads of tomatoes at 70¢ per lug, f.o.b. Rusk, Texas. Shipment was made from Rusk, Texas, to Chicago, Illinois, and the produce was accepted by the respondent, who refused to make payment therefor.

Respondent was present at the hearing on this case, and on the disciplinary case which involved these shipments, with others, but failed to enter his appearance or offer any defense.

Ruling included in Decision

Respondent failed, in violation of section 2 of the act, truly and correctly to account to complainant for any part of the contract purchase price of the two carloads of tomatoes. Complainant was awarded \$910, plus interest.

S-2748, October 15, 1941, Docket 3803: (Hearing)

A. LEVY & J. ZENTNER CO., SAN FRANCISCO, CALIF. v. DAVIS BROS. CHICAGO, ILL.

Violation charged: Failure to pay for a carload of tomatoes.

Principal point involved: Failure to pay any part of contract purchase price was in violation of section 2 of act.

Order: Complainant awarded \$585, plus interest.

Outline of Facts

On or about September 5, 1940, complainant sold to respondent a carload of tomatoes at 90¢ per lug, f.o.b. shipping point, or \$585 for the carload. Shipment was made from Watsonville, Calif., to respondent at Chicago, Ill., and the tomatoes were accepted by respondent, who failed to pay any part of the contract purchase price.

Respondent did not appear in this case and did not enter his appearance in the disciplinary case, although personally present at the time of the hearing.

Ruling included in Decision

Respondent failed, in violation of section 2 of the act, truly and correctly to account to complainant for any part of the contract purchase price of the tomatoes. Complainant was awarded \$585, plus interest.

S-2752, October 17, 1941, Docket 4016: (S.P.)

F. L. BEHLING, MOORHEAD, MINN. v. MCKENZIE BROKERAGE CO.,
SPRINGFIELD, MO.

Violation charged: Failure to pay for
nine carloads of potatoes.

Principal point involved: Failure to pay
purchase price was in violation of
section 2 of act.

Order: Complainant awarded \$2289.01,
plus interest.

Outline of Facts

During March, 1941, complainant sold to respondent nine carloads of potatoes for the total net agreed price of \$2289.01, delivered at Springfield, Mo., after deducting the transportation charges paid by the respondent. Shipment was made from points in Minnesota, and the potatoes were accepted by the respondent, who failed to pay any part of the purchase price. Complainant asked for an award of the amount due.

Respondent failed to file an answer to the complaint, but in a disciplinary case, on July 15, 1941, admitted the allegations in the disciplinary complaint, which included these transactions, and waived an oral hearing.

Ruling included in Decision

Respondent failed, in violation of section 2 of the act, truly and correctly to account to complainant for any part of the purchase price of the potatoes. Complainant was awarded \$2289.01, plus interest.

S-2771, October 25, 1941, Docket 3913: (S.P.)

WILENSKY & CO., CHICAGO, ILL. v. M. BENENSON, ATMORE, ALABAMA

N-12 Violation charged: Failure to ship
 potatoes in accordance with contract.
 Principal point involved: Ordinarily
 depositions are given greater weight
 than affidavits.
 Order: Complaint dismissed.

Outline of Facts

Complainants alleged that on or about June 10, 1940, through their agent, they purchased from respondent four car-loads of potatoes which were to be shipped from Atmore, Alabama, to complainants at Chicago, Illinois; that it was agreed that if the potatoes reached destination at a grade lower than provided in the invoice they would be accepted in the lesser grade and paid for on that basis; that complainants had no opportunity to inspect the potatoes until arrival at Chicago, when an inspection was made showing that they failed to meet the contract specifications in that they contained excessive soft rot decay; and that on account of the failure of respondent to furnish potatoes as specified in the contract complainants suffered a loss of \$268.

Respondent filed an answer, alleging that complainants' agent was present when the potatoes were brought to the loading platform, where they were graded, sacked and loaded into the cars, and that he made many personal examinations and was present when Federal inspection was made and was supplied with inspection certificates; that it was expressly agreed that the sale was to be for cash f.o.b. platform Atmore, and that respondent gave a discount of 5 to 10¢ per cwt. below the market price in consideration of the transaction being a sale "on the ground and f.o.b. Atmore, Alabama, without any recourse on me."

Respondent submitted depositions to sustain his contentions; complainants relied on sworn statement of facts and an affidavit to support their allegations.

All four cars were inspected at Chicago and the inspection certificates on two of them indicated that the potatoes conformed to the contract of purchase and sale and were in suitable shipping condition. The potatoes in each of the other two cars were to be U.S. Commercials and were so found to be by Federal-State inspector at Atmore. Federal inspection certificate issued at Chicago, dated June 14, on one car showed that it was restricted

to condition only and to the portion of the lot remaining in the car at time of inspection. What percentage of the potatoes were removed by complainants prior to inspection was not shown. The inspection made on the other car was similarly restricted.

Ruling included in Decision

Complainants failed to establish by a fair preponderance of the evidence that the potatoes did not conform to the specifications of the contract of purchase and sale. The sworn statements of the complainants and the respondent as to material facts were in direct conflict. Ordinarily depositions are given greater weight than affidavits. The complaint was dismissed.

S-2772, October 27, 1941, Docket 3812: (S.P.)

MATHEW MERCURIO, YOUNGSTOWN, OHIO v. MESSINA BROS. CO. INC., SHARON, PA.

Violation charged: Failure to pay the full contract purchase price for 100 bags of potatoes.

Principal point involved: Failure to make delivery of part of potatoes sold justified buyer in withholding amount equal to additional cost of replacement purchase.

Order: Complaint dismissed.

Outline of Facts

On August 27, 1940, complainant sold to respondent 100 bags of Jersey potatoes at \$1.30 per bag, and 100 bags of Pennsylvania potatoes at \$1.25 per bag, for transportation by respondent's trucks from complainant's place of business in Youngstown, Ohio, to Sharon, Pa. Complainant delivered the Jersey potatoes but refused to make delivery of the Pennsylvania potatoes. In replacement, respondent claimed to have purchased 100 bags of Pennsylvania potatoes from a firm in Youngstown, for which he was obliged to pay \$1.45 per bag, and in making payment to complainant withheld 20¢ per sack on these 100 bags, or \$20. Complainant asked for an award for \$20.

Respondent submitted five depositions in support of his contentions. Copies of them were sent to complainant with a letter of May 26, 1941, with notice that he was allowed five days within which to reply by sworn statement. No reply was filed, however.

Ruling included in Decision

The preponderance of the testimony was in favor of respondent. The failure of complainant to make delivery of the Pennsylvania potatoes in accordance with its contract was without reasonable cause and respondent was therefore justified in withholding \$20 to cover the additional cost of potatoes purchased in replacement. The complaint was dismissed.

S-2779, October 28, 1941, Docket 2779: (Hearing)

RILEY-McFARLAND CO., CHICAGO, ILLINOIS v. H. RUBENSTEIN & COMPANY, MILWAUKEE, WISCONSIN.

Violation charged: Unjustified rejection of a carload of tangerines.

H-35. Principal point involved: When sale made December 13, shipment held and diverted at buyer's request December 19, but seller not notified of refusal until December 20 and then through carrier, rejection was not in reasonable time.

Order: Complaint dismissed.

Outline of Facts

Complainant alleged that on or about December 13, 1940, it sold to respondent, for Winter Haven Packing Co., a carload of 800 boxes of tangerines from Winter Haven, Florida, "Chicago acceptance on inspection by Standard Inspection Service 12/13/40 as requested by respondent," at \$1.25 per box delivered; that respondent requested, by telephone, that the car be not diverted until respondent arrived in Chicago on December 14, at which time he would give diversion instructions; that on December 14, respondent verbally requested complainant to file "team track order to save two days demurrage and divert car to Milwaukee"; that it was not until December 20 that respondent refused to take delivery; and that following rejection the tangerines were resold for \$399.48, or at a loss of \$251.32 to complainant, for which an award was requested. An assignment from Winter Haven Packing Co. to complainant was attached to the complaint.

No answer to the reparation complaint was filed by respondent, but at the hearing on this case counsel for respondent requested that portions of the disciplinary proceeding which were relevant and pertinent to this case be made a part of the record. In the answer filed in the disciplinary case it was alleged that the packages of tangerines were fraudulently "mismarked," about one-third of them being undersized, which, he contended, constituted a valid defense.

Rulings included in Decision

1. The evidence on behalf of complainant did not show that the tangerines met the contract requirements as to size. Attached to the complaint was a telegram dated December 20, 1940, from a Federal inspector, reading in part "Boxes marked 210 showed 223 to 267 count per box. Some 120 showed 140 count."

2. The sale was made at Chicago on December 13 and the shipment was diverted, at the request of respondent on December 19, to Milwaukee, Wisconsin. While the sale was made on December 13, it was not until the afternoon of December 20 that the seller received notice of the refusal of the tangerines by respondent, and then the notice was from the carrier instead of from the respondent. This was not within a reasonable time and was in violation of section 2 of the act. However it was impossible to determine the amount of damage due to the delay in rejecting the shipment or how much of the alleged loss of \$251.32 was properly attributable to the fact that about one-third of the tangerines were considerably smaller than specified in the contract. The complaint was therefore dismissed.

S-2780, October 28, 1941, Docket 3841: (S.P.)

BURD PRODUCE CO., DELRAY BEACH, FLORIDA v. JOHN VENA,
PHILADELPHIA, PA.

Violation charged: Failure to pay
his share of a loss incurred on a
joint account transaction involving
a truckload of beans.

M-25

Principal point involved: Accounting by
New York dealer to respondent with later
written report to complainant was not
considered a ratification by respondent
of joint account transaction.

Order: Complaint dismissed.

Outline of Facts

The record showed that, prior to this transaction, the parties participated in the handling of shipments of beans on joint account, complainants making the purchases in Florida and respondent reselling at Philadelphia, or on other markets. On November 11, 1939, respondent's employee wired complainants that Bountiful beans were selling at Philadelphia at \$2.50 per hamper, and "unless movement there," apparently meaning Delray Beach, Florida, "extremely light and if price high today want you govern self according movement. We don't have to have them." On November 12, complainants wired respondent that shipment was being made that day, and on November 13 respondent's employee wired "Prefer you place load beans out yesterday elsewhere

personally cant see anything but loss these prices beans fob." During the afternoon of November 13, complainants wired respondent that the market was stronger and "believe Mandell Edwards will buy our load . . ." Respondent answered "Okeh sell Mandell Edwards . . . load rolled yesterday." Complainants claimed that the truckload of 558 hampers of beans which were shipped on or about November 12 from Florida were diverted to J. Schwartz, New York City (who was selected by respondent to handle the beans) with instructions by complainants to Schwartz to sell the beans on that market and forward the report of sale, together with the net proceeds, to the respondent at Philadelphia, and that these beans were handled by them and respondent on joint account, and sought an award for one-half of the amount of loss sustained.

Ruling included in Decision

The exchange of these wires seemed to support the respondent's contention that there was no agreement to have the beans sold at New York City for the joint account of the parties. The mere fact that J. Schwartz reported the results of the sale to the respondent and that he later included the amount of the check received from the sale made in New York City in a written report to the complainants, dated December 8, 1939, was not considered a ratification of the transaction as a joint account transaction. The complainants forwarded the shipment to J. Schwartz and remittance was made to the respondent in accordance with the complainants' instructions. Since the evidence failed to establish a joint account agreement entered into by the complainants and the respondent, the record was insufficient to subject the respondent to liability for loss incurred in handling the beans, and the complaint was therefore dismissed.

S-2783, October 30, 1941, Docket 3975: (S.P.)

FLORIDA FRUIT AND PRODUCE, INC., JACKSONVILLE, FLA. v.
H. PAYNE, GAINESVILLE, FLORIDA.

Violation charged: Unjustified rejection
of 300 lugs of tomatoes.

Principal points involved: Incumbent on
complainant to establish contract;
Statute of Frauds of State of Florida
not complied with.

Order: Complaint dismissed.

C-8
F-40

Outline of Facts

Complainant alleged that on September 10, 1940, respondent requested complainant to purchase a car of California tomatoes, respondent agreeing to take half of the car, or 700 lugs, at \$1.60 per lug, plus 10¢ per lug to be paid to complainant, a total price of \$510; that the tomatoes were shipped to complainant from Guadalupe, California and arrived at Jacksonville, Florida on September 18, at which time the market suffered a decline and respondent refused to take them; that it was necessary for complainant to place in storage the tomatoes that respondent was to accept, and consign some of them to be handled to the best possible advantage in order to prevent complete loss; that complainant received \$16 for 16 lugs and \$60 for 132 lugs, or a total of \$76; that the remaining 152 lugs had to be dumped and that there was due from respondent because of the rejection \$434, for which amount an award was requested.

Respondent, in his answer, denied contracting for the purchase of the tomatoes. Complainant filed a sworn statement of facts reiterating the allegations of the complaint; respondent's sworn statement of facts denied the contract.

Ruling included in Decision

It was incumbent on complainant to establish by a fair preponderance of the evidence that such an agreement was entered into, and it failed to do so. Furthermore, section 5780 of the Compiled General Laws of Florida provides, in substance, that no contract for the sale of any personal property shall be good, unless the buyer shall accept the goods (or part of them) and actually receive the same, or give something in earnest to bind the bargain or in part payment, or some note or memorandum in writing signed by the party to be charged, or his agent. It did not appear that the provisions of this statute were complied with. The complaint was therefore dismissed.

S-2798, November 14, 1941, Docket 3900: (S.P.)

VALLEY GROWERS EXCHANGE, SAN JOSE, CALIF. v. M. LAPIDUS & SONS,
CHICAGO, ILLINOIS.

Violation charged: Failure to pay the full purchase price for two carloads of mixed vegetables.

Principal point involved: No implied warranty as to defects which inspection should have revealed.

Order: Complaint dismissed.

Outline of Facts

On November 17, 1939, respondents, through their agent, purchased two mixed carloads of vegetables from complainant, 174 crates of lima beans being included in the shipments at respondents' direction. They were obtained from commission houses in San Francisco and Los Angeles, Calif., and upon arrival at San Jose were inspected by respondents' agent. Shipment was made from San Jose and upon arrival at Chicago respondents complained as to quality and condition of the beans. They accepted and paid for the other vegetables but treated the limas as consignments, their accounts sales showing 90 crates sold for a gross of \$170.25 and net proceeds of \$104.53, and 84 crates for a gross of \$57.40, 27 crates dumped and a deficit of \$8.27 on the second lot. Complainant claimed the beans were purchased by respondents' agent, who "inspected and accepted" them at the price of \$3.25 per crate f.o.b. San Jose, and asked for an award on the basis of the agreed original contract price.

Respondents contended that the beans "were purchased as being of good merchantable quality and in good condition to carry to Chicago"; that upon arrival their agent was advised that they would be sold for complainant's account, and he, in turn, conveyed the information to complainant. Respondents' agent testified that he inspected only two or three crates of the beans.

Rulings included in Decision

1. At the time of respondents' agent's inspection the "whole load" was on the platform and was available for a more extensive and thorough inspection than was made, and there can be no implied warranty as to defects in a commodity which should have been revealed by the buyer's inspection thereof.

2. The record supported respondents' claim that they were authorized by complainant to handle the lima beans on a consignment basis. Respondents' agent testified that he showed respondents' wire of November 24, wherein complaint was made that the beans were small, shriveled and wormy, to complainant, who said "wire your house to do the best you can to minimize the losses." Such statement was corroborated by respondents' agent's answering wire of November 25 wherein he said "Valley agreeable handle for their account depending on you minimize losses." Such testimony was only inferentially denied by complainant. Since respondents' wire of November 24 referred to the beans then arrived and the car which was then in transit; it was evident that respondents' agent's answering wire related to both shipments. The complaint was dismissed.

S-2800, November 15, 1941, Docket 3765: (Hearing)

BENJAMIN B. SMITH, ASSIGNEE FOR THE BENEFIT OF CREDITORS OF
M. CORNFIELD, ST. LOUIS, MO. v. R.H. SHAKE, PAYETTE, IDAHO.

Violation charged: Unjustified rejection
of six cars of prunes.

F-17

N-12

Principal point involved: Since impossible
to reconcile versions of parties, the
circumstances surrounding the transactions
and the actions of parties must be
analyzed to determine their intention.

Order: Complaint dismissed.

Outline of Facts

On or about August 17, 1939, M. Cornfield sold to respondent six carloads of U.S. No. 1 prunes at 55¢ per half bushel, f.o.b. Freewater, Oregon, bills of lading, government inspection reports, and invoices to be delivered to the purchaser at Payette, Idaho, for each carload as shipped. Beginning on August 21 there were shipped to New York, N.Y., 6 carloads of prunes of the kind, amount and quality agreed upon, as shown by government inspection reports, but the bills of lading, invoices and inspection certificates were, through mistake on the part of Cornfield, sent to New York and did not come into the hands of respondent at Payette, until August 29, concerning which respondent made complaint to Cornfield. In a telephone conversation of August 29, apparently confirmed by telegram of the same date from respondent to Cornfield, a new contract was entered into whereby the six cars would be returned to Cornfield and the money already paid by respondent would be returned to him, but there was disagreement between the parties as to the meaning or intention of the contract of August 29. Cornfield claimed respondent authorized him to sell the cars "for whom it may concern" and file a claim for whatever loss was sustained. He therefore sought an award for the deficit incurred in re-selling.

Respondent claimed to be released from responsibility with reference to the cars.

Ruling included in Decision

Respondent's rejection of the prunes was not without reasonable cause and not in violation of the act. Since it was impossible to reconcile the two versions of the parties, the circumstances surrounding the transactions and the actions of the parties must be analyzed to determine their intention. Since Cornfield, through no fault of respondent, failed to deliver the necessary papers in due course of business, respondent was in a position to reject the cars or to accept delivery

and recover for any loss. However, he elected to take the matter up with Cornfield, and persuaded him to accept the return of the prunes. Cornfield immediately returned that part of the purchase money already received by him. He accepted the return of the papers. He endeavored to resell, and finally resold, the prunes for his own account, during the period August 30 to September 5. No account of sales was ever rendered to respondent, and no demand was ever made upon him for any loss on the prunes. After the resales were made, the matter was never discussed by the parties, either by correspondence or in person. Respondent had no notice of any claim until after the complaint was filed on January 15, 1940. The complaint was therefore dismissed.

S-2803, November 18, 1941, Docket 3801: (Hearing)

DETROIT TOMATO & PRODUCE CO., DETROIT, MICH. v. R. PHILLIPS TRADING COMPANY, INC. and J.V. FORNO, NOGALES, ARIZONA.

Violation charged: Failure to deliver five carloads of tomatoes in accordance with contract.

M-15

Principal point involved: Payment by president of respondent, in individual capacity, without responsibility for performance of contract, of sum equal to advance, was good consideration for compromise agreement.

Order: Complaint dismissed.

Outline of Facts

On or about June 10, 1939, respondent contracted to sell and to ship from points in Mexico to complainant at Detroit, Mich., five carloads of tomatoes, receiving an advance of \$750 on the purchase price. Respondent failed to make delivery and the corporation, of which Mrs. R. Phillips Parks was president, lost all its assets and became inactive. After filing an informal complaint, the complainant sent Mrs. Parks a letter dated March 23, 1940, stating: "Now we want the money we advanced you or the five cars as our contract calls for." Mrs. Parks responded by offering to give complainant her personal check for \$750 if complaint were withdrawn. By letter of March 30, 1940, complainant replied "Send us your personal note as you stated . . . We will write the U.S. Department of Agriculture and ask them to withhold our claim as we have reason to believe it will be amicably settled." For some reason, the note was not delivered but, by a check for \$200 and by authorizing deductions from the prices of tomatoes subsequently purchased by complainant, Mrs. Parks remitted \$750 or more. Complainant asked for an award in the amount of \$4,534.30, the difference between the contract price and the alleged cost of tomatoes purchased to replace those which respondents failed to deliver.

Ruling included in Decision

Complainant's letter of March 30 was construed as an acceptance of Mrs. Parks' proposal to settle the entire claim for \$750. It could not be said that the payment of \$750, that being an undisputed portion of the claim, was not adequate consideration for the compromise agreement. Mrs. Parks, in her individual capacity, was in no way responsible for the performance of the contract with complainant. Therefore, since the partial payment was made by one not obligated to pay, it was good consideration, even though the claim be regarded as undisputed and liquidated in its entirety. Moreover, it was thought that a single unliquidated claim was involved herein--not a liquidated claim for refund of the \$750 advance and an unliquidated claim for damages. Respondents were not obligated to refund the \$750, as such, in the absence of a rescission of the contract, which would be inconsistent with the complainant's claim for damages caused by breach of the contract. The amount of the advance would be material only in computing the damages resulting from the failure to deliver, that is, the difference between the cost of replacement and the unpaid portion of the contract price. There being one unliquidated claim involved, partial payment thereof constituted good and sufficient consideration for the compromise agreement. Since the claim presented by complainant was compromised and settled, the complaint was dismissed.

S-2805, December 2, 1941, Docket 3845: (S.P.)

MICHAEL S. TORNATORE, CANASTOTA, N.Y. v. SCRANTON PRODUCE CO., SCRANTON, PA.

Violation charged: Unjustified rejection of two truckloads of onions.

Principal point involved: Burden of proof rested on complainant.

Order: Complaint dismissed.

Outline of Facts

Complainant claimed that on November 8, 1940, he sold to respondent 2000 bags of onions, represented as "good stock," at 65¢ per 50-lb. bag delivered Scranton, Pa.; that he tendered to respondent 2 truckloads, totaling 660 bags, which were rejected by respondent unjustifiably; and that because of such rejection he was damaged in the sum of \$176, for which an award was asked.

Telegrams exchanged showed that on November 8 complainant confirmed the sale of 1000 bags of onions and offered to confirm an additional 1000, at 65¢ per bag; respondent confirmed the purchase of 1000 bags or more, and complainant then

wired he would "start delivering Monday morning 2000 bags." Respondent claimed that in a telephone conversation it was specifically made a part of the contract that the onions were being purchased for cold storage and that they therefore should be "fancy onions, and Horseshoe Brand"; that the onions tendered on November 11 and November 12 were not fancy, not U.S. No. 1, were frozen, soft and some rotted, and were not suitable for cold storage; that when the onions were refused, complainant's driver talked with complainant by telephone and complainant and respondent agreed that the deal was called off. Respondent pointed out that Federal State inspection report, dated November 11, of inspection at Canastota, N.Y., covering "Packer's count 500 sacks" was not sufficiently identified with the load of 330 sacks which arrived at 5:30 a.m. November 11 at Scranton, Pa., approximately 157 miles distant.

Complainant waived filing of opening statement of facts or a reply statement. This meant there was no denial or explanation of the facts as alleged in respondent's original answer and "additional answer."

Ruling included in Decision

The evidence was insufficient to establish that respondent's refusal to accept the two loads of onions was without reasonable cause. The inspection certificate appeared to have been made prior to removal of the onions from a "warehouse." While the 330 bags comprising the first load of onions were not clearly identified as a part of the 500 sacks inspected, neither was there corroborating proof that the two loads tendered were "frozen, soft, and some rotted" and did not grade U.S. No. 1. The wires exchanged by the parties did not set out any warranty. It was noted, however, that the respondent's first wire confirmed the purchase of three loads of onions "as per our telephone conversation." Respondent alleged that the "entire contract was entered into between the complainant and Jonas S. Cohen for the respondent on the telephone." It therefore appeared that the warranty upon which the respondent relied was oral and probably preceded the sending and receipt of the wires referred to above. There was a deficiency of convincing proof to support the allegations of the complaint and the same failure of proof applied to the allegations of the respondent's answer. Since the burden of proof rested upon the complainant rather than upon the respondent, the complainant did not meet the burden of proof. The complaint was dismissed.

S-2810, December 5, 1941, Docket 4035: (Hearing)

Re: Application of H.E. Hall for a license under the Perishable Agricultural Commodities Act.

Principal point involved: Violations on which order to show cause based were same as those on which previous license had been suspended.

Order: H.E. Hall be granted a license upon payment of \$10 fee.

Outline of Facts

On June 20, 1941, H.E. Hall, of Indianapolis, Indiana, applied for a license under the Perishable Agricultural Commodities Act. After investigation by a representative of the Department it was believed that a notice of hearing and order to show cause should be issued and served on the applicant, which was done on August 12, 1941, it being alleged that H.E. Hall was unfit to engage in business because in July, 1939 he purchased 11 carloads of watermelons from a man in Georgia for which he failed to pay \$865 and in September, 1938 he handled two carloads of apples for a man in Virginia, rendering account sales showing net proceeds of \$730.82, no part of which was remitted to the shipper. The applicant admitted the charges of failure to account, assigning as a reason therefor financial reverses and an illness which confined him in a hospital for three months.

Prior to the date of the violations referred to in the order to show cause the license held by the applicant was revoked by order dated July 21, 1938, because of failure to account promptly to shippers for the purchase price of produce shipped in interstate commerce. Upon petition of the respondent for further consideration and modification of that order, by order dated March 13, 1939 the revocation order of June 21, 1938 was set aside and in lieu thereof respondent's license was ordered suspended for 90 days, to become effective immediately if, within two years from the date of the order, there was reason to believe he had again violated the act. By order dated August 30, 1939, upon a showing that respondent had again violated the act through failure to account to shippers in connection with two interstate shipments of produce, respondent's license was suspended for 90 days. Thereafter the license terminated.

Ruling included in Decision

The applicant should not be denied a license. The violations which brought about the suspension of respondent's license were the identical violations which occasioned the issuance of the order to show cause herein. In suspending the respondent's license for 90 days, the provisions of the order of March 13, 1939 were applied. No formal action was taken at that time in connection with the violations of the act by the respondent in that proceeding. In retrospect, it appeared that the disciplinary action then taken was extremely light, in view of the nature of the acts committed by respondent, and that formal action might have been taken in lieu thereof warranting the possible revocation of respondent's license. However, since the suspension provision of the order of March 13, 1939 was put into effect on or about September 9, 1939, and a considerable period of time had elapsed from the date of the violations which brought about the suspension to the date of the application herein, it was concluded that no further disciplinary action should be taken against the applicant. It was therefore ordered that H.E. Hall be granted a license upon the payment of the fee of \$10.

S-2818, December 9, 1941, Docket 3906: (S.P.)

WESCO FOODS CO., CHICAGO, ILL. v. PRODUCERS SERVICE CORPORATION,
BENTON HARBOR, MICHIGAN.

Violation charged: Failure to deliver
peaches in compliance with contract
terms.

F-10
N-13
Principal points involved: In delivered
sale shipper assumed risk of damage in
transit; Government inspection certifi-
cate controlling over testimony of biased
witnesses as to condition upon arrival.

Order: Complainant awarded \$291.89, plus
interest.

Outline of Facts

On September 18, 1940, respondent contracted to sell to complainant 300 bushels of U.S. No. 1 Elberta peaches, 2 inches and up, at \$1.40 per bushel and 100 bushels of U.S. No. 1 Elberta peaches, 1-3/4 inches and up, at \$1.15 per bushel delivered Toledo, Ohio. Three hundred twenty bushels of 2 inch peaches and 100 bushels of 1-3/4 inch peaches were shipped by truck and received in Toledo about midnight of the same day. Complainant claimed that 20% of the peaches were badly bruised and that the shipment did not grade U.S. No. 1, and on the afternoon following arrival notified

respondent that they were rejected. Respondent refused to remove the peaches and complainant caused 417 bushels to be resold through commission merchants for \$297.90, from which a 10% commission of \$29.79 was deducted. On October 3, complainant paid for the peaches, at the agreed price, a total of \$563, giving notice that this proceeding would be instituted. Complainant asked for \$314.89, representing the difference between the price paid and the net proceeds of resale, plus prospective profits of \$20.

Respondent answered the complaint, claiming that the purchasing agent of complainant inspected and accepted the peaches at the time the contract was entered into, and that the peaches were satisfactory when delivered in Toledo. He submitted an affidavit by the truck driver who hauled the peaches, to the effect that they were in good condition on arrival and were accepted as satisfactory by the receiver.

Complainant claimed the truck driver was not qualified to judge the condition of the peaches and that the employee of the receiver named by respondent as accepting the peaches was employed as a laborer and was not authorized to receive merchandise.

Rulings included in Decision

1. Although it was not denied that the peaches were inspected and approved by an agent of the complainant before shipment, there was no acceptance of them. This was demonstrated by the written contract, which stipulated that the peaches were sold delivered at Toledo. Respondent, in selling on a delivered basis, assumed all risk of damage in transit, and agreed to deliver in satisfactory condition.

2. Respondent failed, without reasonable cause, in violation of section 2 of the act, to deliver peaches in accordance with its contract. As to the condition on arrival, little weight could be given the approval of the complainant's purchasing agent before shipment, or the acceptance of the fruit by the receiver's employee. The truck driver, having been responsible for the care of the peaches in transit, was a biased witness. Therefore, even though the Federal inspection took place 14½ hours after delivery, the certificate thereon controlled as to the condition of the peaches at time of delivery. Certificate of that inspection, which occurred at 2:30 in the afternoon following delivery, supported complainant's contention as to condition. Since the fruit was sold on a delivered basis and arrived in an unsatisfactory condition, complainant was entitled to damages equal to the difference between the contract price and the net resale price, or \$294.89. However, complainant failed to account for three bushels. They were presumed to have been

worth the highest price received on resale, \$1 per bushel, and complainant's recovery was reduced by \$3. Damages could not be allowed for loss of prospective profits, since they seemed to have been merely speculative. Complainant was awarded \$314.89 less \$3 and \$20, or \$291.89, plus interest.

S-2822, December 11, 1941, Docket 3749: (S.P.)

S.H. & E.H. FROST, NEW YORK, N.Y. v. GEORGE GORDON FRUIT & PRODUCE CO., NEW HAVEN, CONN.

Violation charged: Unjustified rejection of a carload of asparagus.

B-7
F-22 Principal point involved: No contract effected due to variance in broker's memoranda of sale, difference relating to meaning of "price arrival," whether wholesale price or jobbing price.

Order: Complaint dismissed.

Outline of Facts

On or about April 3, 1940, through the Atlantic Commission Company as broker, complainant and respondent agreed that complainant would divert one carload of asparagus, then moving from a California loading point, to respondent at New Haven, Conn. Diversion of the car was effected, and it arrived at New Haven on April 8. After inspection, respondent rejected the shipment on the ground that it was not suitable for its needs and was not U.S. No. 1 grade. Complainant sought an award of damages of \$344.67 because of unjustified rejection.

The broker's New York office issued a memorandum of sale bearing this endorsement: "Price arrival to be priced up as same as similar stock selling through Frost's jobbing store same day." The broker's New Haven office issued memorandum, which was signed by the respondent, in which it was stated: "Price on arrival based on N.Y. market." Respondent's justification for rejection was based upon the meaning of the words "price arrival," it being stated "it was my understanding, and the understanding of the New Haven wholesalers, that price on arrival based on the New York market gave the purchaser the privilege of inspecting the carload on arrival to determine whether the merchandise was of a quality suitable to the purchaser's needs, and that the price to be paid for said merchandise, if it was suitable to the purchaser's needs, was to be based upon the New York market for similar quality stock."

Complainant contended that "this was not a sale on a mere price arrival basis, but a case where the contract was entirely completed - there only remained to determine the price of the car on the date of arrival in New Haven, based on the price at that time obtained in New York. No right was given in the memorandum to respondent to inspect the car on its arrival in New Haven. We owed the respondent no obligation whatever except to see that nothing was contained in the car that was not fit for human consumption."

Respondent secured Federal inspection, the inspector certifying that the asparagus in "most crates" was "fairly clean, in some fairly clean to slightly dirty, mostly slightly dirty; in a few crates most stalks slightly dirty, some dirty." and that in "most crates" there was "less than 1% decay, in some 1 to 5%, in a few as high as 10%, average approximately 2%. Decay is mostly Bacterial Soft Rot, few cases Fusarium Rot, both rots in all stages, mostly in early stages, generally effecting tips." The inspector found that "in most crates" the "stock grades U.S. No. 1 *** but lot as a whole fails to grade U.S. No. 1 *** account dirty stock in a few crates."

Ruling included in Decision

Since the two memoranda issued by the broker specified different prices, there was no meeting of the minds of the parties and no contract was effected. The two statements have widely different meanings. That appearing on the memorandum issued by the New York office indicated that the price was to be based on sales through Frost's jobbing store on the day of arrival. In other words, that the price was to be based, not on the wholesale price in New York, but on the jobbing price. The wording used in the memorandum of sale issued at New Haven just as clearly meant that the price was to be based on the market price in New York, by which phrase, of course, was meant the wholesale market price. It was unreasonable to suppose that one who was buying an entire car of asparagus would agree to pay for it on the basis of the jobbing price rather than on the basis of the wholesale car-load price. The complaint was therefore dismissed.

S-2826, December 27, 1941, Docket 3951: (S.P.)

C. L. FAIN CO. INC., ATLANTA, GA. v. W.E. ROCHE FRUIT CO. INC.,
YAKIMA, WASHINGTON.

Violation charged: Failure to deliver
apples in accordance with contract
specifications.

D-4a Principal point involved: In f.o.b. sale
of Delicious apples decay which increased
from $\frac{1}{2}\%$ to at least 15% in transit
considered to have deteriorated abnormally
and shipper failed without reasonable cause
to deliver in accordance with contract.

Order: Complainant awarded \$396.18, plus
interest.

Appeal: Filed in January 1942; jury, in
May, 1942, found for respondent.

Outline of Facts

On November 15, 1940, respondent sold to complainant 756 boxes of Washington Fancy Delicious apples at \$1 per box f.o.b. Yakima, complainant specifying the route but requesting respondent to exercise its own discretion as to the type of transportation service used. On November 30, shipment was made by ventilated car to St. Louis, with initial icing at that point for the remainder of the trip. The apples, according to Federal inspection, at shipping point graded Washington Fancy, with less than one-half of 1% decay. The car arrived at Atlanta, Ga., at 5:40 p.m. December 9, with the bunkers two-thirds full of ice. Complainant accepted the apples but had another Federal inspection made at 5:30 p.m. December 10, which showed an average decay of 15%. Complainant asked for an award of \$396.18, representing the expense of \$24.35 in sorting and repacking a part of the shipment, and \$371.83, the value of 230-2/3 boxes of apples, which were decayed and worthless on arrival, at \$1.612 per box (the contract price plus freight).

The only defense asserted by respondent was that the apples graded Washington Fancy at shipping point and were shipped under customary instructions by a route selected by complainant.

Ruling included in Decision

Respondent failed, without reasonable cause, to make delivery in accordance with contract. According to regulations under the act, the term "f.o.b." requires that the commodity sold shall be in suitable shipping condition; that is, such a condition as will, under normal transportation service and condition, assure delivery without abnormal deterioration at destination specified. Apparently, the transportation service and conditions were normal in this

instant, but the apples deteriorated abnormally in transit. A decay of less than one-half of 1% at time of shipment, November 30, 1940, had increased to an average of at least 15% upon arrival at Atlanta. The record indicated that at least 230-2/3 boxes of apples, upon arrival, had deteriorated to such an extent as to be worthless. Depositions made by complainant's salesmen and one of its customers showed that at least 61-2/3 additional boxes were found bad after resale by complainant. Complainant was awarded \$396.18, plus interest.

Appeal

Appeal to Federal District Court filed by respondent in January, 1942. In May, 1942, jury found for respondent, no reasons being given.

S-2829, December 29, 1941, Docket 4036: (S.P.)

T. C. CURRY, WASHINGTON, D.C. v. KIBE PRODUCE COMPANY, TACOMA, WASHINGTON.

Violation charged: Failure to make full payment for purchase of vegetables.

Principal point involved: Failure to pay various shippers constituted repeated and flagrant violations of section 2 of act.

Order: Respondent's license No. 74065 revoked, effective January 16, 1942.

Outline of Facts

Disciplinary complaint was filed by T.C. Curry, an employee of the U.S. Department of Agriculture, charging failure to pay the full contract price for the following purchases of produce made in Portland, Oregon and transported to Tacoma, Washington:

		<u>Sales</u> <u>Price</u>	<u>Amt.</u> <u>Due</u>
From F. Felipelli	11-14-40 - 11-29-40		
	carrots,		
	parships,		
	turnips	\$ 96.60	\$ 96.60
" Nick Rossi	11-1-39 - 11-24-40		
	parships,		
	carrots,		
	turnips	363.30	213.25
" K. Kinoshita	11-11-40		
	cauliflower &		
	Brussel sprouts	54.65	54.65
" T. Okino	10-28-40 - 10-30-40		
	cauliflower	20.50	20.50

A copy of the complaint was mailed to respondent on August 15, 1941. In a letter received by the Department from Richard R. Hodge, it was stated that on August 1, 1941, Leslie Jochimsen was appointed receiver of the respondent corporation for the purpose of liquidating its affairs, and that Mr. Hodge was the attorney for the receiver. On October 9, 1941, the receiver filed a written waiver of oral hearing on behalf of respondent, admitted that the facts alleged in the complaint were true, and consented to the issuance of an order suspending or revoking the respondent's license.

Ruling included in Decision

Respondent's failure and refusal to account and pay in full the various shippers named in the transactions mentioned above constituted repeated and flagrant violations of section 2 of the Perishable Agricultural Commodities Act. Respondent's license No. 74065 was therefore revoked, effective January 16, 1942.

S-2830, January 3, 1942, Docket 4059: (S.P.)

ALAMO CITRUS ASSOCIATION, ALAMO, TEXAS v. J. HYMAN BROKERAGE CO., OMAHA, NEBRASKA.

Violation charged: Failure to pay the agreed price for a truckload of grapefruit.

Principal point involved: Broker's failure to keep shipper properly informed and his subsequent expression of intention to bear any material loss considered as implied guarantee to shipper.

Order: Complainant awarded \$98.48, plus interest.

Outline of Facts

After preliminary correspondence regarding the sale of a truckload of grapefruit, respondent, acting as broker, on November 17, 1940, wired complainant: "Unable contact Trimble now know Trimble wants your pack ship your prices Monday." The following day (Monday) complainant shipped from Alamo, Texas, to Omaha, Nebraska, a truckload of grapefruit, the aggregate price of which was \$573.10 delivered Omaha. Trimble Bros. refused to buy the fruit, and respondent stored it with them and requested their assistance in securing its sale. Complainant was not informed of these developments until December 6, at which time respondent assured complainant that any material loss would be borne by respondent. Trimble Bros. remitted net proceeds of \$574.62 to respondent, who deducted \$215.03 for freight which he had paid, and two brokerage fees of \$25 each, leaving \$309.59, which was paid over to complainant. Complainant asked for an award of \$123.48.

A copy of the complaint was served on respondent on September 26, 1941, but he neglected to answer.

Rulings included in Decision

1. Respondent, having failed to answer the complaint, was deemed to have admitted the allegations of the complaint.

2. In the light of his failure to keep complainant properly informed and his subsequent expression of an intention to bear any material loss, respondent was considered to have impliedly guaranteed, by his telegram of November 17, 1940, that the fruit would bring the complainant's prices. Since the fruit sold for less, a proper accounting by respondent with respect to the transaction would involve payment to complainant of the difference between the actual proceeds and the complainant's prices. It was conceded that the freight and the brokerage fees, one of which was for a prior transaction, were properly deducted. Reparation was sought in the sum of \$123.48, but that figure allowed the respondent credit for only one of the two \$25 brokerage fees. Complainant was awarded \$123.48 less \$25, or \$98.48, which was also the difference between \$673.10 and \$574.62.

S-2834, January 13, 1942, Docket 3734: (Hearing)

W. VAN BOKKELEN, ASSIGNEE (OSCAR APPELGREN & CO.) NEW YORK CITY vs. BREAM-HEEB COMPANY, CHAMBERSBURG, PA.

Violation charged: Failure to deliver.

Principal point involved: No response having been received to notice of reassignment for hearing, case dismissed for lack of prosecution.

Order: Complaint dismissed.

Outline of Facts

The complaint, filed by W. Van Bokkelen as assignee of a cause of action of Oscar Appलगren & Co., Gothenburg, Sweden, was assigned for hearing in connection with complaints in two other proceedings, and hearing was held beginning February 24, 1941. Complainant's attorneys announced the complainant was "not ready to proceed with the Van Bokkelen case" and it was then agreed that the Secretary might determine whether the original complaint had been filed within nine months from the date the alleged cause of action accrued, and, if determined to have been filed within the statutory period, "***some method" would be "later devised to accommodate the parties." It was found that the informal complaint in this case was sufficient to stop the running of the nine months' statute of limitations and that the complainant, therefore, had the right to submit testimony in support of the allegations of the complaint. The hearing was

continued for that purpose. Thereafter, by letters dated September 2 and October 11, 1941, W. Van Bokkelen, assignee, was informed that the complaint would be reassigned for hearing unless the complainant "determined that there would be no object in prosecuting the complaint further."

Ruling included in Decision

In the absence of any response to the letters of Sept. 2 and Oct. 11, 1941, the complaint was ordered dismissed for lack of prosecution.

S-2835, January 13, 1942, Docket 3955: (S.P.)

BATTAGLIA & BURGER, INC., KLAMATH FALLS, OREGON v. J. HYMAN
BROKERAGE CO., OMAHA, NEBRASKA.

Violation charged: Unjustified rejection
of a carload of potatoes.

Principal points involved: Seller cannot
compel broker to assume liability for
purchase price; time consumed in efforts
to have purchasers agree to pay draft
promptly did not show negligence or make
broker liable as purchaser or guarantor.
Order: Complaint dismissed.

B-8
M-21
B-11
F-14

Outline of Facts

The complaint in this case related to a carload of potatoes shipped on May 23, 1940 from Sahfter, California to Omaha, Nebr., and charged negligence on the part of the respondent in undertaking to make sale for complainant. On May 30, respondent, on behalf of several prospective purchasers, submitted an offer of \$2.60 per 100 lbs. delivered, and on the same day complainant wired "Unless secure 2.70 we diverting . . ." Respondent then wired sale had been made to a certain firm at a delivered price of \$2.70, but complainant wired that, due to the financial rating of the purchaser, it would confirm the sale only on the basis of drafting respondent for the purchase price, respondent in turn to make collection. On June 1, respondent advised that the purchaser refused to pay cash and respondent refused to finance the deal, preferring that complainant make sale elsewhere. Complainant replied on June 1, saying respondent was "just little late advising (car number.) We insisting delivery . . ." Respondent again wired refusal to finance the deal, suggesting sale be made elsewhere, and complainant wired "selling elsewhere your account . . ."

In its opening statement of facts, complainant stated that its claim was based on the fact that respondent did not

answer until June 1 complainant's wire dated May 30, concerning the rating of the purchaser, and contended that the notice then given of respondent's "inability to consummate deal" was not within a reasonable time.

Ruling included in Decision

The evidence failed to show that respondent acted negligently in endeavoring to dispose of the shipment for complainant's account. The wires referred to above showed that complainant expected respondent to pay for the potatoes on the basis of \$2.70 per 100 pounds and to look to the buyers thereof for reimbursement. Complainant could not compel the respondent to assume that liability. On June 1, respondent wired its refusal to "finance" the buyers. The time consumed by respondent in his efforts to have the purchasers agree to pay the draft promptly did not make him liable as a purchaser, or guarantor, or otherwise subject the respondent to liability by virtue of the regulations promulgated by the Secretary of Agriculture for carrying out the provisions of the act. Respondent's connection with the transaction commenced on May 30, and was terminated by complainant's wire of June 1, that it was "selling elsewhere." The complaint was therefore dismissed.

S-2836, January 13, 1942, Docket 3698: (Hearing)

PHILADELPHIA PRODUCE CREDIT & COLLECTION BUREAU, PHILADELPHIA, PA., v. MANUEL TISCHLER, ATLANTIC CITY, N.J.

Violation charged: Failure to pay for produce purchased from complainant's assignors.

N-4 Principal point involved: Burden on complainant to establish its claim by preponderance of evidence.

Order: Complaint dismissed.

Outline of Facts

Complainant alleged that respondent was a dealer subject to license under the Perishable Agricultural Commodities Act and that in September 1939 complainant represented fifteen jobbers who, by contract, sold to respondent or his agent (broker) various l.c.l. interstate lots of fruit and produce, and that respondent refused to pay the contract price of \$1175.60 therefor.

A copy of the complaint was served on respondent at Mizpah, N.J., on January 31, 1941, and he filed an answer admitting he was a dealer subject to license, but claiming that the complaint was technically defective, and denying that complainant was the assignee of the various creditors involved, or that he owed complainant any sum.

At the hearing the examiner stated that a number of depositions in the file were considered part of the record. One of the eight was stricken from the record, on the motion of respondent's counsel, because it had not been taken upon the authorization required by the rules under the act. Respondent's counsel argued that the alleged claims were not supported by adequate evidence, and that, from the evidence, it could not be determined whether complainant or fifteen others owned the claims alleged in the complaint.

Ruling included in Decision

It was not clear that Manuel Tischler owed complainant for any of the produce. Respondent did not claim that he had paid for what he bought in the fifteen transactions, and some of his claimed defenses were quite technical. However, these considerations did not relieve complainant of the burden of establishing its claim by a preponderance of the evidence. On seven of the transactions, the nearest approach to evidence was found in the allegations of the complaint. On another, a purported deposition was stricken from the record, but even that document contained a blank as the answer to the question "state the transaction." Each witness, in the seven depositions relating to the other seven items, testified that the original jobber still owed the claim, although instruments attached to and incorporated in the complaint purported to assign each of the fifteen claims to the complainant. The complaint was dismissed.

S-2838, January 19, 1942, Docket 3831: (Hearing)

Re: Application of Independent Fruit & Produce Co., St. Louis, Mo., for a license under the Perishable Agricultural Commodities Act.

K-9

Principal point involved: Section of act allowing applicant for license opportunity for hearing within 60 days from date of application is mandatory and therefore jurisdictional.

Order: Order to show cause dismissed.

Outline of Facts

On November 9, 1940, Independent Fruit and Produce Co. filed an application for a license under the act to engage in the business of handling fresh fruits and fresh vegetables in interstate commerce. On March 26, 1941, the Assistant Secretary of Agriculture issued an order to show cause why a license should not be denied, on the ground that the applicant was unfit to be licensed since William Wielansky and Fannie Wielansky, the President and Vice President, respectively, were formerly the President and Treasurer and the Secretary, respectively, of Liberty Fruit and Produce Co., St. Louis, Mo., and in the latter capacities were responsible for flagrant and repeated violations of section 2 of the act. Numerous alleged violations of the act, occurring in June, July and August, 1940, were set out.

Counsel for the applicant moved that a license should be granted because it is the mandatory duty of the Secretary of Agriculture to grant a license on an application duly filed with the Department "unless there is an opportunity for a hearing within 60 days from the date of the application."

Ruling included in Decision

Opportunity for a hearing was not granted to the applicant within 60 days, as required by section 4(d) of the act. That section, under which this proceeding was initiated, appears to be clearly mandatory and, therefore, jurisdictional. The order to show cause was therefore dismissed for lack of jurisdiction, and it was held that the applicant was entitled to receive a license.

S-2843, January 20, 1942, Docket 3802: (S.P.)

PACIFIC COAST FRUIT DISTRIBUTORS, INC., LOS ANGELES, CALIF. v. VOLKER BROKERAGE CORPORATION, NEW YORK, N.Y.

Violation charged: Failure to pay a loss sustained on resale, upon failure to receive letters of credit of fruit intended for export.

Principal point involved: Authority from seller to broker to reduce the quoted purchase price if he thought advisable was inconsistent with considering him as the purchaser.

Order: Complaint dismissed.

Outline of Facts

The complaint in this case covered a controversy arising in connection with a quantity of California oranges sold by complainant for export to France, payment of the oranges to be effected by letters of credit to be furnished by the French buyers for whom the fruit was intended. When the letters of credit were not received, complainant resold the fruit at an alleged loss of \$2716.96. Complainant claimed that the respondent was liable for breach of the contract, either as the purchaser of the fruit or as agent for the French purchasers whose identity was not disclosed, and asked for an award for the amount of his loss,

Rulings included in Decision

1. Respondent was not considered a purchaser of the fruit, but an agent of the complainant. Correspondence between the parties was initiated by the respondent's inquiry whether complainant would be interested in supplying oranges "on a brokerage basis." In the course of the negotiations which followed, complainant agreed to protect the respondent's commission and, in one instance, gave respondent authority to reduce a quoted price if such was thought advisable. It was inconceivable that respondent would be invested with a discretion as to price if he were purchasing the oranges.

2. Respondent was not intended to be responsible for the payment of the purchase price of the oranges. The fact that he was agent for complainant would not necessarily preclude a finding that he was acting as agent for the French buyers, but, even though it were assumed that he was agent for both complainant and the French buyers and that as such a dual agent may be liable where he fails to disclose to one principal the identity of the other, there would be no liability here if it was the mutual understanding of the parties that respondent was not to be responsible for the payment of the purchase price. Respondent suggested that the cars of oranges shipped to New York should be billed open to it, respondent to pay drafts for the fruit only after the letters of credit had been negotiated by it for the complainant. The latter rejected this proposal because it did not know the respondent well enough and requested permission to forward the shipping documents attached to a draft drawn against the respondent. The respondent replied that it could make the French credits available to the complainant by assignment to the latter or to the Barr Shipping Corporation. The procedure suggested by the complainant, the respondent explained, would require it to make payment before the letters of credit were negotiated and, as a broker, it should not be expected to do so. It was then agreed that the letters of credit should be assigned to the Barr Shipping Corporation of New York and negotiated by that concern for the complainant. The complaint was dismissed,

S-2850, January 26, 1942, Docket 4052: (S.P.)

RE: L. H. McFADDIN, DOING BUSINESS AS McFADDIN DISTRIBUTING COMPANY,
DETROIT, MICHIGAN.

Violation charged: The making of false and misleading statements.

Principal point involved: False and misleading statements regarding receipt of payment from buyer, and failure to account promptly, constituted flagrant violation of section 2 of act.

Order: Respondent's license suspended for 90 days upon further violation of the act or regulations within 3 years from date of order.

Outline of Facts

In complaint filed under the act, McFaddin Distributing Co., the broker in the transaction, was charged with the making of false and misleading statements, either with knowledge of the true facts or in reckless disregard thereof, in connection with the handling of a carload of tomatoes, for the purpose of forcing the Chicago, Illinois seller to grant an unjustified allowance to a Detroit, Michigan buyer.

The sale was made on or about January 28, 1941 at a price of \$878.40, and the tomatoes were diverted from Chicago to Detroit and were accepted by the buyer. On January 30 the buyer gave to the broker its check for \$878.40 in full payment for the invoice price, and on February 1, the broker presented it through regular banking channels and received payment. The seller notified the broker that it was invoicing the buyer direct and that collection by the broker from the buyer was without authority. From the time of receipt of payment to April 15, 1941, the broker failed, neglected and refused to pay over the net proceeds to the seller and during the month of February addressed several letters to the seller in which he represented that he had not received the money in payment for the tomatoes because the buyer had stopped payment on the check. Litigation having arisen in connection with the transaction, the broker deposited the money in the National Bank of Detroit, Detroit, Michigan.

A copy of the complaint was served on the broker and he filed an answer, dated October 29, 1941, admitting some of the material allegations of the complaint and denying others. Subsequently the truth of the allegations of the complaint was admitted and hearing was waived, and the Secretary of Agriculture was authorized to make and enter findings of fact and an appropriate order based on the findings of fact.

Ruling included in Decision

The statements of the McFaddin Distributing Co. that the buyer had stopped payment on the check and would not pay the net invoice price were false and misleading, and those statements, together with failure to account promptly for the net purchase price of the tomatoes, constituted a flagrant violation of section 2 of the act. Ordinarily, such a flagrant violation would merit a revocation of the respondent's license. However, in view of the respondent's admission of guilt, a waiver of hearing, and the fact that there had been deposited in the National Bank of Detroit, Detroit, Michigan, \$878.40 in a commercial account, pending the outcome of the controversy in suit between the seller and the buyer, it was believed that the interest of justice would best be served by permitting respondent to remain in business, subject, however, to the strictest supervision. The license, No. 44067, issued to the McFaddin Distributing Co. was therefore ordered suspended for 90 days, to become effective by supplemental order, at any time within 3 years from the date of this order if the Secretary of Agriculture shall have reason to believe that respondent has, within the 3 year period, again violated any of the provisions of the act or the regulations promulgated thereunder, McFaddin Distributing Co. agreeing that, for the purpose of determining whether he is complying with the provisions of the act, duly authorized representatives of the U.S. Department of Agriculture may at any time during regular business hours, for such period as this suspension order may be held in abeyance, examine his records.

S-2852, January 27, 1942, Docket 4030: (S.P.)

C.H. ROBINSON COMPANY, MINNEAPOLIS, MINN. v. VOLPE & MOSKOWITZ, CLEVELAND, OHIO.

Violation charged: Failure to pay for a carload of potatoes.

Principal point involved: Since broker guaranteed payment of purchase price and paid it to seller, broker was subrogated to rights of seller and to cause of action against buyers.

Order: Complainant awarded \$243.20, plus interest.

B-8

C-3

Outline of Facts

On or about November 4, 1940, complainant sold to respondents, for and on behalf of a Kansas City, Mo. firm, a carload of potatoes for shipment from Idaho, at the agreed price of \$243.20 delivered at Cleveland, Ohio. Respondents accepted the shipment at Cleveland, but thereafter failed and refused to pay the Kansas City firm. Complainant had guaranteed to the seller the purchase price, and, when respondents failed to make payment, it remitted therefor. Complainant asked for an award in the amount of \$243.20.

Respondents' answer did not deny the allegations of the complaint, but related to a different transaction. They alleged that they handled a prior shipment, consisting of peaches, for the complainant's account, and had not been reimbursed for amounts expended on the complainant's behalf.

Rulings included in Decision

1. The prior transaction was not a proper subject to counterclaim, even if pleaded as such in the answer. In its opening statement of facts, complainant showed that the prior shipment, referred to by respondents in their answer, which was made on or about September 5, 1940, was delivered to the respondents for sale for the account of a fourth party and not for the account of the complainant. Moreover, that transaction took place more than nine months prior to the filing of the answer.

2. Since complainant guaranteed the payment of the price by the respondents to the seller of the potatoes, and, upon respondents' default, paid the price to the seller, the complainant was subrogated to the rights of the seller and to the cause of action which it might have prosecuted against the respondents. Complainant was therefore awarded \$243.20, plus interest.

S-2853, January 30, 1942, Docket 3830: (Hearing)

In Re: Application of Joseph Sharamitaro and Mike Sharamitaro for a license under the Perishable Agricultural Commodities Act to operate as Regina Fruit and Produce Co., at St. Louis, Mo.

K-9

Principal point involved: Section of act allowing applicant for license opportunity for hearing within 60 days from date of application is mandatory and therefore jurisdictional.

Order: Order to show cause dismissed.

Outline of Facts

On October 12, 1940, Joseph Sharamitaro and Mike Sharamitaro filed an application for a license to operate as Regina Fruit and Produce Co. On March 25, 1941, there was issued an order to show cause why license should not be denied on the ground of unfitness to be licensed in that Mike Sharamitaro was formerly vice president of the Liberty Fruit and Produce Co., St. Louis, Mo., and in that capacity was responsible for flagrant and repeated violations of section 2 of the act, numerous alleged violations occurring in June, July and August, 1940 being set out.

A hearing was held on September 9 and 10, 1941, at which there was considerable evidence introduced, and the issues involved were vigorously contested. Counsel for the applicants moved that a license should be granted because it is the mandatory duty of the Secretary of Agriculture to grant a license on an application duly filed with the Department unless there is an opportunity for a hearing within sixty days from the date of the application.

Rulings included in Decision

1. The position taken by the applicants in their motion to dismiss had merit. The section of the act relied upon, and under which this proceeding was initiated, appears to be clearly mandatory, and, therefore, jurisdictional. It was not necessary, therefore, to consider the evidence, since the order to show cause must be dismissed for lack of jurisdiction.

2. Since it was necessary to dismiss the order to show cause, it was concluded that the applicants were entitled to receive a license.

S-2860, February 5, 1942, Docket 3691: (Hearing)

CHAS. S. SIMPSON CO. LTD., TORONTO, CANADA v. McDAVITT & LIGHTNER INC., BROWNSVILLE, TEXAS.

Violation charged: Failure to pay deficits incurred in selling six carloads of tomatoes on consignment.

Principal points involved: It is duty of commission merchant to inform principal of all facts and circumstances relating to consignment to enable principal to protect its interest; under counter-complaint respondent failed to prove alleged loss.

Order: Complainant awarded \$790.44

B-6
N-5

Outline of Facts

Between the dates May 23 and June 9, 1939, complainant received and sold, for the account of the respondent, six carloads of tomatoes shipped from Brownsville, Texas. On June 10, 1939, complainant submitted accounts sales which, in summary, showed the following:

Proceeds of sales		\$7,636.05
Expenses:		
Advances	\$3,053.55	
Freight	2,774.64	
Duty	2,196.40	
Commission	610.83	
Car rental	188.00	
Cartage	132.90	
Icing	81.00	9,037.32
		<hr/>
Deficit		\$1,401.27

All expenses and charges which contributed to the deficit were paid by the complainant. Prior to the filing of this complaint, the complainant made demand on the respondent for the payment of the deficit and the respondent refused such payment. This complaint was then filed, with request for award of reparation.

Respondent questioned the jurisdiction of the Secretary of Agriculture over this matter on the ground that the act requires foreign claimants to post a bond, and contended that the complainant did not properly perform its obligations under the contract, in that accurate information concerning the progress of sales was not given. Counterclaim was filed for the amount of \$1500, alleged to have been lost because of complainant's failure to perform its duty.

Rulings included in Decision

The Secretary of Agriculture had jurisdiction in this matter. The complaint was filed under the provisions of section 6(e) of the act, which allows the Secretary to waive the bond requirement in respect to complainants who are residents of countries which allow the filing of complaints by citizens of this country without a bond. Such a practice of reciprocity does exist between the United States and Canada.

2. Complainant failed to prove performance of services for which respondent promised to pay commissions. It is the duty of a commission merchant to inform the principal of all facts and circumstances, relating to a consignment, which make it necessary for the principal to take steps necessary for the

protection of his interests. This was the rule applied in *Franzell & Company v. Cohen et al*, S-1403. The duty of the complainant was particularly well defined in the instant case because of the respondent's repeated requests for information concerning the situation in Toronto, both as to the general market and the complainant's individual situation. A review of the facts of this case shows that sufficient information was not furnished to apprise the respondent of the real circumstances. One of the complainant's first reports on the first four cars to arrive was to the effect that only a few were sold, because of the green condition of the tomatoes. Four days later, it was reported that sales were being held up because the fruit had ripened. The sudden ripening was attributable, according to the complainant, to an abnormally high temperature. The alleged rise in temperature was not supported by the record. At later times, complainant reported difficulty in disposing of the tomatoes and low prices, but none of the communications put the respondent on notice of the amount of the stock on hand and the exact price which had been obtained. Certainly, no intimation was given that heavy deficits were being incurred. For example, when respondent suggested the diversion of a car if trouble was being encountered in netting 70¢, the response, though ambiguous, could reasonably be interpreted to mean that losses were not being incurred. The reports, if not intentionally misleading, were so carelessly and vaguely made as to constitute a breach of the duty resting on the complainant. For the breach of this duty, it must be held that the complainant has not proved its claim for services rendered.

3. Respondent failed, in violation of section 2 of the act, to account truly, correctly and promptly to complainant for the charges against the goods paid by the complainant. Complainant was awarded \$790.44.

4. Respondent failed to prove the amount of damages caused by complainant's failure to perform proper services. The goods, legal title to which was in the respondent, were in Toronto after an election by the respondent to ship them to that point rather than to sell them on an f.o.b. or cash market; consequently, possible sale of the goods, after withdrawal from the complainant, would have been limited to Toronto or to markets to which diversion could have been accomplished. There was no evidence to prove with any degree of certainty the amount which could have been obtained for the goods on the Toronto market or on whatever other markets to which diversion may have been possible.

S-2363, February 10, 1942, Docket 4078: (S.P.)

DONALD G. NELSON, ALTOONA, PA. v. FRED MORINELLI, JR.,
PHILADELPHIA, PA.

Violation charged: Failure to pay the full contract purchase price for a carload of celery.

H-13 Principal point involved: When shipment
M-2 delayed and not of quality or condition contemplated, respondent justified, after informing shipper, in selling for best price obtainable and accounting accordingly.
Order: Complaint dismissed.

Outline of Facts

Complainant claimed that respondent purchased, on March 7, 1941, at \$3.20 per crate delivered, a carload of celery which had been shipped February 28, 1941, from Los Angeles, California, and that upon arrival of the celery at Philadelphia, it was accepted by respondent, who paid complainant \$703.43, leaving a balance of \$487.97 due and owing, for which complainant asked for an award.

Respondent claimed that the celery was purchased to arrive in Philadelphia in time for the market of March 10; that on March 10 it had not arrived and complainant was directed to cancel the order, which he agreed to do, but in a telegram sent later during the day, he said that the celery would arrive on March 11; that it did not arrive until March 12, at which time respondent did not want it; that when it arrived, the Government inspection showed that it contained 30% decay and 35% yellow blight; and that on account of the condition of the celery, it was thought that by selling it immediately, it would result in a much smaller loss to the complainant. The net proceeds of sale, \$703.43, without any charge for commission, were remitted to complainant.

A copy of respondent's answer was served on complainant on December 1, 1941, but he failed to file an opening statement of facts.

Destination Federal inspection certificate stated, in part: "Stock that is free from decay is fresh and crisp; top leaves mostly green, some yellow; 35% of stalks show top leaves badly spotted with Late Blight. 10 to 55%, averaging approximately 30% decay, mostly Bacterial Soft Rot and Watery Soft Rot, all stages, mostly advanced and affecting few to many top leaves and many branches."

Ruling included in Decision

Since the celery was not delivered until two days after the time agreed upon, and was not of the quality and in the condition contemplated by the parties, respondent, to prevent further loss to complainant, after informing him of the delay and the condition of the celery, was justified in selling it promptly for the best price obtainable, and rendering the complainant a detailed account of the prices received and the expenses in connection with the sale. The complaint was therefore dismissed.

S-2864, February 10, 1942, Docket 3776: (S.P.)

P. W. COPPERSMITH & CO., CHICAGO, ILL. v. A.J. TEBBE & SONS CO., COTULLA, TEXAS; O'KEEFE BROS., LAREDO, TEXAS: AND ZIMMERMAN BROS., BALTIMORE, MD.

Violation charged: False representation by Tebbe & Sons and O'Keefe Bros.; failure truly and correctly to account promptly for proceeds of sale by Tebbe & Sons; unjustified rejection by Zimmerman Bros.

D-4x

Principal points involved: Rejection was not without reasonable cause; tomatoes showing at destination average of 12% shoulder scars or dark discolored areas and 2% Bacterial Soft Rot, not in suitable shipping condition.

Order: Complainant awarded \$1347.24, plus interest, against O'Keefe Bros.; complaint dismissed as to Zimmerman Bros. and A.J. Tebbe & Sons Co.

Outline of Facts

On December 4, 1939, complainant purchased from O'Keefe Bros., through A.J. Tebbe & Sons Co., as brokers, a carload of U.S. No. 1 tomatoes and a carload of U.S. No. 2 tomatoes, for \$1,125 and \$812.50, respectively, making a total purchase price of \$1937.50, f.o.b. Laredo, Texas. On December 8, A.J. Tebbe & Sons Co., acting for complainant, sold the two carloads to Zimmerman Bros., of Baltimore, Md., for \$1,962.50 cash f.o.b. shipping point. On arrival at Baltimore, they were rejected by Zimmerman Bros., and subsequently sold, one car for net proceeds of \$555.95, and the other for \$59.31, a total of \$615.26. Complainant asked for an award of damages in the amount of loss sustained.

Texas State inspection certificates issued on December 4 showed that the tomatoes in the first car graded U.S. No. 1 and those in the second car graded U.S. No. 2. Federal inspection at Baltimore, on December 13, showed that the first car failed to grade U.S. 1 "only account excessive percentage showing shoulder scars or dark discolored sunken areas," with "8 to 20% averaging approximately 12% tomatoes showing shoulder scars or dark discolored sunken areas. 2% Bacterial Soft Rot, various stages." The second car was certified as failing to grade U.S. No. 2 "only account excessive shoulder scars and tomatoes showing dark, discolored sunken areas," with "8 to 25% averaging approximately 15% serious damage from shoulder scars or dark discolored sunken areas, affecting $\frac{1}{4}$ to $\frac{1}{2}$ surface of tomatoes. 2% Bacterial Soft Rot, various stages."

After arrival and inspection at Baltimore, Zimmerman Bros. telephoned the Department, asking for an opinion as to whether good delivery had been made, and the following telegram was sent to them: IT IS OUR OPINION THAT TOMATOES PURCHASED FOB AND CERTIFIED AT DESTINATION AS CONTAINING SHOULDER BRUISES AND DISCOLORATIONS RANGING EIGHT TO TWENTY-FIVE AVERAGE FIFTEEN PERCENT IN ONE EIGHT TO TWENTY AVERAGE TWELVE PERCENT IN OTHER ARE NOT PROPERLY CONSIDERED AS HAVING BEEN IN SUITABLE SHIPPING CONDITION.

Rulings included in Decision

1. Rejection of the tomatoes by Zimmerman Bros. was not without reasonable cause. A report of standardization research made by an employee of the Department to determine the percentages of various condition defects appearing in fresh tomato shipments on arrival at destination markets, based on Federal inspection certificates, in which every third certificate issued for the Western Perishable Association of New York City during the years 1938 and 1940, was analyzed, showed that the deterioration in the tomatoes was abnormal. The complaint as to Zimmerman Bros. was therefore dismissed.

2. O'Keefe Bros., by selling the tomatoes f.o.b. shipping point, under the regulations promulgated by the Secretary of Agriculture for carrying out enforcement of the act, represented that they were in suitable shipping condition. Therefore, since the report of the investigation showed that the tomatoes were not in suitable shipping condition at shipping point, O'Keefe Bros. failed to comply with their contract and were liable to complainant for the loss sustained on the shipment. Complainant was awarded the difference between the sale price to Zimmerman Bros., \$1962.50, and total net receipt from resale, \$615.26, or \$1347.24, plus interest.

3. The complaint against A.J. Tebbe & Sons Co. was dismissed, since it was admitted by complainant that they acted only as agent in this matter.

S-2866, February 13, 1942, Docket 3941: (Hearing)

WILLIS PARTEE CO., MILAN, TENN. v. S. STROCK & COMPANY, BOSTON, MASS.

Violation charged: Unjustified rejection of a carload of tomatoes.

Principal point involved: Amicable settlement between parties prior to hearing resulted in dismissal.

Order: Complaint dismissed.

Outline of Facts

Complaint was filed under the Perishable Agricultural Commodities Act, for the recovery of damages arising out of the rejection by S. Strock & Company of a carload of tomatoes shipped in interstate commerce. A hearing was held on December 8, 1941, at Boston, Mass., at which attorney for the complainant stated for the record that the matter had been settled amicably between the parties.

Ruling included in Decision

The complaint against S. Strock & Company was ordered dismissed.

S-2867, February 13, 1942, Docket 3943: (Hearing)

S. ALBERTSON CO. INC., BOSTON, MASS. v. SAWYER & COMPANY, INC., BOSTON, MASS.

Violation charged: Unjustified rejection of a carload of cherries.

Principal point involved: Efforts made prior and subsequent to hearing resulted in amicable settlement between parties.

Order: Complaint dismissed.

Outline of Facts

Complaint was filed under the Perishable Agricultural Commodities Act for the recovery of damages arising out of the rejection of a carload of cherries shipped in interstate commerce. A hearing was held at Boston, Mass., on December 8, 1941. Since the case appeared to be of a kind which lent

itself to adjustment between the parties, efforts were made, prior to and subsequent to the hearing, to have the parties settle the matter between themselves. As a result thereof, by a letter dated December 15, 1941, the attorney for the complainant wrote the examiner that the parties had reached an agreement and settled the matter amicably between themselves.

Ruling included in Decision

The complaint against Sawyer & Company, Inc. was ordered dismissed.

S-2869, February 16, 1942, Docket 3912: (S.P.)

A. BERKOWITZ COMPANY, CHICAGO, ILL. v. JOHN DeMARTINI CO. INC., SAN FRANCISCO, CALIF.

Violation charged: Failure to deliver a carload of tomatoes in accordance with contract specifications.

Principal points involved: In determining whether good delivery made on contract for produce of certain percentage of a U.S. grade, there will be applied the tolerance provided in the grade for decay or other factors causing progressive deterioration; acceptance of allowance completed fulfillment of contract and precluded further claim.

D-9
F-17
F-35
H-30
M-7

Order: Complaint dismissed.

Outline of Facts

On or about June 15, 1939, through a broker, respondent sold to complainants a carload of tomatoes to be 85% U.S. No. 1, or better, at \$1.90 per lug delivered. Shipment was made from the Merced district of California, to Chicago, Illinois, where the car arrived June 21, and, after negotiations between the parties, respondent granted complainants an allowance of 25¢ per lug on 150 lugs, or \$37.50. Complainants claimed that the allowance was accepted under duress, they being placed in a position of being forced to defend themselves in a reparation complaint filed with the Department by respondent and since the tomatoes were in danger of serious deterioration while standing on track and the market was falling, acceptance of the allowance should not bar recovery for the amount of damages sustained by complainants; that the tomatoes at the time of delivery were not of the quality and grade required by the contract, the local office of the Department on June 21, by telephone, reporting that the

shipping point inspection certificate would be reversed; that the car stood on track for seven days during the time the parties were attempting to settle the controversy, and during that period the market declined and the tomatoes further deteriorated. They asked for an award of \$262.85, representing the alleged loss less the allowance.

Respondent claimed that the tomatoes were of the kind and quality set forth in the confirmation of sale, both at shipping point and at destination; that when first advised that the shipping point inspection would be reversed respondent offered to make an allowance of 25¢ per lug on the entire car, but when destination inspection failed to reverse the shipping point inspection respondent repudiated that agreement, and was justified in doing so since the offer was made in reliance on report received by telephone; and that, on information that the tomatoes did not grade 85% U.S. No. 1, it made an allowance of 25¢ per lug on 150 lugs, or \$37.50, which amount was tendered to and accepted by complainant as "a full and final settlement of all claims."

Certificate of Federal inspection at Chicago, restricted to accessible portion of load, consisting of upper two layers of lugs, certified that most lugs graded U.S. No. 1, but lot as a whole failed to grade U.S. No. 1 only on account of bruising in some lugs, the lot then containing approximately 85% U.S. No. 1 quality, "Stock mature, clean, generally fairly well to well formed, fairly smooth to smooth; grade defects average 8% consisting mostly of misshapen, few scars." and "Average approximately 85% mature green, 10% turning and 5% ripe and firm; less than 1% decay. In three stacks next bunkers each end of car ranging from 4% in some lugs to 50% in others, average approximately 20% show from 1 to 4, mostly 1 or 2 soft water-soaked bruised spots generally occurring at contact point with other tomatoes."

Rulings included in Decision

1. It was doubtful whether good delivery was made on the contract, since the progressive deterioration was far in excess of that contemplated in the specifications of grade U.S. No. 1. That grade provides that not more than 10%, by count, of the tomatoes in any container may be below the requirements of this grade and that not more than one-half of this tolerance, or 5%, shall be allowed for defects causing serious damage and not more than 1% may be allowed for soft ripe tomatoes or tomatoes affected by decay at shipping point. In addition, a total tolerance of not more than 5% shall be allowed for soft ripe tomatoes, and not more than a total of 5% for tomatoes affected by decay en route or at destination. The term "serious damage"

is defined in the standards as meaning any injury which seriously affects the appearance, or the edible or shipping quality. Any certificate issued by the Federal or Federal-State Food Products Inspection Service must be interpreted in the light of the grade referred to, and the facts set forth in the certificate. A certificate, showing the produce referred to therein as being of a percentage of a U.S. grade, cannot be considered as indicating that good delivery has been made on a contract calling for such percentage of the grade, if it shows an amount of decay or other factors causing progressive deterioration in excess of the tolerance provided in the grade. In determining whether good delivery has been made on a contract calling for produce of a certain percentage of a U.S. grade, there must be applied the tolerances provided in the grade for decay or other factors causing progressive deterioration.

2. In view of the state of the record with respect to the other issue in this proceeding, it was not necessary to determine whether the tomatoes met contract requirements. The record clearly showed that, after negotiations between the parties with a view to an amicable settlement, it was definitely agreed that there should be an allowance of \$37.50. The parties made the settlement long before the letter of August 31, 1939, on which complainants relied to support the contention that the tomatoes were not at time of delivery of the grade and quality required by the contract, was written by a representative of the Department. Therefore, that letter could not be regarded as having any material bearing on the situation with respect to the agreement in regard to the allowance. The contention of the complainants that the acceptance was under duress could not be sustained. The evidence clearly established the fact that the granting of the allowance and the acceptance thereof completed a fulfillment of the contract.

3. Since complainants accepted the allowance as a satisfactory settlement of the matter in dispute, and since complainants accepted and paid for the tomatoes, the parties fully performed their obligations under the contract, and the complaint was therefore dismissed.

S-2871, February 16, 1942, Docket 4061: (S.P.)

MARTIN FOOD PRODUCTS, INC., SUCCESSOR TO PRODUCTS CORPORATION
OF AMERICA, CHICAGO, ILL. v. HARTMANN DRIED FRUIT CO., INC.,
MACEDON, N.Y.

Violation charged: Failure to deliver
in accordance with contract 20,518 lbs.
of frozen strawberries.

C-3
C-17
H-14
Principal points involved: Complainant was
proper party to bring action since it
succeeded to rights of Products Corporation
through merger; respondent deprived of
advantage of crop shortage provision in
contract by own admission it could have
made full delivery.

Order: Complainant awarded \$256.48, plus
interest.

Outline of Facts

On or about June 10, 1940, by contract in writing, through a broker, respondent contracted to sell to the Products Corporation of America 85 barrels of 3 plus 1 New York State Premier & Gibson Varieties, strawberries, 1940 crop, subject to buyer's approval, and 10 30-lb. tins, at the agreed price of 7¢ per pound on a delivered basis, to be shipped from Macedon, N.Y. to Chicago, Ill. Respondent shipped 18,032 lbs., but failed to ship the remaining 20,518 lbs. called for by the contract. The buyer was compelled to purchase strawberries at 8-1/4 cents per pound delivered in order to fulfill the contracts theretofore entered into, and asked for an award of damages in the difference between the original contract price of the 20,518 lbs. (at 7¢), \$1436.26, and the cost of replacement, \$1692.74, or \$256.48.

Respondent admitted that the contract was entered into with Products Corporation of America, but stated: (1) That it made no contract with Martin Food Products, Inc.; (2) that Products Corporation of America was aware of the crop shortage; (3) that the failure of Products Corporation of America to accept samples of the strawberries in a reasonable time made it impossible for respondent to deliver more than the pro rata "deliveries"; and (4) that the complainant failed to show any damage.

Rulings included in Decision

1. Although it was true that respondent entered into the contract with the Products Corporation of America and not with the Martin Food Products, Inc., the evidence showed that the latter corporation was the successor to the former by the merger of the Products Corporation of America and another corporation. As a consequence of this merger, complainant succeeded to all the rights of the Products Corporation of America, and was the proper party to bring this action.

2. Respondent's own statement deprived it of the advantage of the provision in the contract that when there was a crop shortage the buyer should accept pro rata delivery without claim or right to damages. On June 29, 1940, a telegram was sent by the broker to the respondent reading, in part, as follows: PRODUCTS CORPORATION SAMPLES ARRIVED THIS MORNING STILL FROZEN ALMOST SOLID CAN NOT POSSIBLY MAKE COOKING TEST TODAY HOWEVER BERRIES LOOK FINE. BECAUSE YOUR PACKING SEASON GETTING SHORT PRODUCTS RECOMMEND YOU START PACKING THE BARRELS AGAINST CONTRACT. In its letter to this Department of September 16, 1940, respondent stated that "had we received Products Corporation's approval on the 29th of June, we could have effected full delivery,--beyond a question of a doubt." This statement indicated that respondent could have made full delivery if it had had the complainant's approval on June 29. In view of the recommendation of the buyer, which was transmitted by the broker on June 29 to the respondent, it seemed that respondent was sufficiently notified that it would be appropriate for it to prepare to fulfill the contract.

3. There was no undue delay on the part of the buyer in informing respondent that the samples were satisfactory. They arrived on Saturday, June 29, and the broker, who was agent for respondent, informed respondent that the berries were frozen and the cooking test could not be made that day. The following day was Sunday, and, on July 1, the broker was definitely informed by the buyer that the strawberries were satisfactory. As previously pointed out, the broker sent a wire to the respondent on June 29, indicating that steps should be taken to fulfill the contract since the "berries looked fine."

4. Respondent failed to ship 20,518 lbs. of strawberries in accordance with the terms of the contract, in violation of the act. The contract provided that shipment could be made at the seller's option within the first month's storage in New York. At the end of the first month's storage period after the approval of the sale, the buyer purchased strawberries to replace those which respondent failed to ship in accordance with the terms

of the contract. The evidence showed that the buyer made a purchase of strawberries at 7¢ per pound f.o.b. Hillsboro, Oregon, and it cost one and one-quarter cents per pound to transport the berries from Hillsboro, to Chicago, Ill. Complainant was entitled to the difference between the cost of the berries purchased and the price at which respondent agreed to sell, or \$256.48, for which amount, plus interest, it was awarded reparation.

S-2873, February 18, 1942, Docket 3875: (S.P.)

ROBBINS POTATO CO., MITCHELL, NEBRASKA v. THE L. J. JOHNSTONE COMMISSION CO., ADA, OKLAHOMA.

Violation charged: Failure to pay for a load of potatoes.

J-1
M-23
C-4
M-23

Principal points involved: Jurisdiction of Department not lost by respondent's assignment for benefit of creditors subsequent to filing of complaint; insolvency law of State not enforceable against non-resident creditor.

Order: Complaint dismissed.

Outline of Facts

Complainant claimed that on September 3, 1940, he sold to respondent a carload of potatoes at $97\frac{1}{2}$ ¢ per 100 lb. sack delivered, less freight of 47¢ per cwt. to Ada, Oklahoma, making an f.o.b. price of $50\frac{1}{2}$ ¢ per cwt. He asked for an award in the amount of the purchase price, claiming respondent did not complain to him as to the decayed condition within 24 hours after arrival of the car at destination, which must be deemed an acceptance of the shipment at the sale price.

Respondent contended that an assignment, which he made for the benefit of creditors under an Oklahoma statute, terminated the jurisdiction of the Secretary in this proceeding; and that on September 2, complainant offered No. 2 Triumph potatoes at $97\frac{1}{2}$ ¢ per cwt. delivered, and, after the purchase of the potatoes, he sold one-half of the carload at \$1.10 per sack, that he informed complainant of such sale, and that complainant answered that, while he had described the potatoes as "throwouts," they would nevertheless pass inspection as No. 2 Triumphs.

The car arrived at Ada on September 6, but was not placed on the unloading track until the following day. Inspection was made of 180 sacks of the potatoes remaining in the car by a Federal-State of Oklahoma inspector on the morning of September 8. The inspector stated that an additional 150 sacks had been

placed in a warehouse. He testified that the "stock shows decay ranging from 6 to 16, averaging 10% soft rot," and that most of the sacks showed wet spots on the outside.

Rulings included in Decision

1. The jurisdiction to consider and determine the issues of law and fact which were presented by the parties under the provisions of the act was not lost by reason of the assignment for the benefit of creditors under the State law. The assignment for the benefit of creditors under the State law was made subsequent to the filing of the complaint and the filing of the respondent's answer in the instant case. The respondent also filed a statement of facts in answer to the complainant's opening statement. It was not shown that the complainant, as a creditor of the respondent, consented to the assignment for the benefit of creditors. Moreover, an insolvency law of a State which provides for a discharge of the debtor's obligation to a resident of another State is not enforceable against such non-resident creditor. This is so even in the absence of a Federal bankruptcy act.

2. Respondent by wire reported to complainant the true condition of the potatoes as described by Federal-State of Oklahoma inspection made on September 8, and stated he would have to "re-run" the potatoes, meaning that they would have to be resorted and resacked. To this proposal complainant wired "Okay go ahead." Complainant's reply indicated that it was understood by both parties that the potatoes did not conform to warranty and that respondent might "go ahead" and resort them in an effort to minimize the anticipated loss on resale.

3. The evidence showed that respondent's disbursements exceeded the gross proceeds of resale. The total proceeds amounted to \$269.20. Respondent's disbursements included payment of freight in the amount of \$169.20. Refunds made to buyers amounted to \$52.75. The cost of re-sorting the potatoes was stated to be \$27.50, which included \$6 paid for new sacks. It was shown that the respondent also sustained a loss of profits in the amount of the difference between \$1.10 per sack on 180 sacks sold to one purchaser, and $97\frac{1}{2}\text{¢}$ per sack, the purchase price, or \$22.50. Respondent did not file a counter-claim and no award could be made in his favor, but the complaint against him was dismissed.

S-2874, February 25, 1942, Docket 4070: (S.P.)

JAC BOKENFOHR, THIBODAUX, LA. v. BERKOWITZ PRODUCE CO.,
AKRON, OHIO.

Violation charged: Unjustified rejection
of a carload of potatoes.

F-1 Principal point involved: Contract not
modified due to mutual misunderstanding
between parties during negotiations
after shipment arrived.

Order: Complaint dismissed.

Outline of Facts

On or about June 6, 1941, respondent, through a broker, purchased from complainant a carload of U.S. Commercial Triumph potatoes, unwashed, packed in new branded 100-lb. sacks, at \$2.15 per cwt. delivered at Akron, Ohio. Shipment was made from Ethel, La., on or about June 6. On the day of arrival, June 10, the broker wired complainant that, due to the "poor quality," respondent had asked for a reduction in price of 25¢ per sack, and complainant consented to reduce the price 15¢ per sack. At 5:00 p.m. that day the broker wired complainant REDUCE DRAFT QUICK *** FIFTEEN CENTS. BERKOWITZ NOT SATISFIED BUT WANTS UNLOAD. At 5:23 p.m. respondent wired the broker CANNOT USE CAR POTATOES SOME SACKS ENTIRELY WORTHLESS. Following rejection, complainant resold the potatoes elsewhere and asked for an award to cover his loss.

Respondent, in his answer, admitted that he accepted the complainant's counter-offer "on the basis of U.S. Commercials."

In a letter dated June 23, 1941, addressed to the Department, complainant stated that he did not deliver "U.S. Commercials . . . but since Berkowitz offered to accept this car at a reduction of 25 cents per hundred, and we counter-offered him an allowance of 15 cents, which he accepted, it is reasonable for us to assume that he opened a new contract, regardless of the fact that the potatoes were truly unclassified, in other words he made a track purchase."

Rulings included in Decision

1. Modification of the original contract was not completed. The broker's first wire to the complainant on June 10 relative to a reduction in price indicated that the respondent did not question the grade of the potatoes. The proposed reduction of 25¢ per sack in the price seemed to have

been made because of the claim that "many saks cut load disarranged . . . poor quality . . ." The respondent's wire of June 10, sent at 5:23 p.m., quoted in part above, seemed to have been sent prior to the complainant's reduction in the amount of the draft which the respondent was expected to pay. Even if the amount of the draft had been reduced prior to the receipt of the respondent's wire notifying the broker that he would not accept the potatoes, the intended modification of the contract would not be binding, because there was a mutual misunderstanding of the parties regarding the class of potatoes with respect to which they were contracting. The record indicated that the respondent's offer to accept the 15¢ reduction was made upon the basis of "U.S. Commercial." When he learned that the potatoes did not come within this classification, he sent the wire in which he gave notice that he would not accept them. In view of these circumstances the respondent's refusal to accept the potatoes did not amount to a rejection without reasonable cause.

2. The potatoes did not grade U.S. Commercial upon arrival at Akron and the record failed to establish that respondent's refusal to accept the shipment was in violation of section 2 of the act. The complaint was therefore dismissed.

S-2895, April 1, 1942, Docket 3982: (Hearing)

PACIFIC COAST FRUIT DISTRIBUTORS, INC., LOS ANGELES, CALIF.
v. WOLF & COHEN, PHILADELPHIA, PA.

Violation charged: Unjustified rejection
of two carloads of grapes.

C-1 Principal point involved: Dismissal requested by complainant as result of new evidence discovered at hearing.

Order: Complaint dismissed.

Outline of Facts

Complainant alleged that respondents violated section 2 of the act by rejecting, without reasonable cause, two carloads of Muscat juice grapes, purchased in interstate commerce, as a result of which the complainant suffered damages in the sum of \$896.88, for which reparation was sought. A hearing was held on December 2, 1941.

In a letter dated February 27, 1942, addressed to this Department, complainant stated that: "... upon the new evidence which came to light at the hearing in Philadelphia concerning these two cars as above recited, we feel honor-bound to request the Department of Agriculture to dismiss our complaint, and by this letter we respectfully ask them so to do."

Ruling included in Decision

The complaint was dismissed, in accordance with complainant's request.

S-2896, April 6, 1942, Docket 4068: (Hearing)

Re: Application of G. & W. Wholesale Fruit & Produce Corporation, New York, N.Y. for a license under the Perishable Agricultural Commodities Act.

K-9 Principal point involved: Corporation was formed for the obvious purpose of affording Joe Garro an opportunity to re-enter the produce business and avoid the injunction against him and evading the law; license denied due to previous flagrant and repeated violations of act.

Order: G. & W. Wholesale Fruit & Produce Corporation's application for a license denied.

Outline of Facts

On October 8, 1941, the G. & W. Wholesale Fruit & Produce Corporation applied for a license under the act and on November 8, 1941 there was issued an order to show cause why a license should not be denied on the ground that Joe Garro, the President of the corporation, was unfit to receive one because on or about June 25, 26, 27 and 28, 1941, he purchased, in the State of North Carolina, from E.P. Leary, of G.C. Leary & Sons, of Camden, N.C., 3 carloads and 9 large truckloads of potatoes for the agreed total net sum of \$3657.40, for which a settlement of approximately 35% was obtained by the shipper at a later date, and from H.G. Dozier, Moyock, N.C., 3 carloads and 16 large truckloads of potatoes for the agreed total net sum of \$5943.53, for which Garro made partial payment of \$1000 on or about June 28 and, for the balance of \$4943.53, a settlement of approximately 35% was obtained by the shipper at a later date.

Garro admitted the facts with reference to these purchases and also that he failed to pay Mr. Pew, of Camden, N.C., for potatoes purchased by him, except for 35% paid in cash and 10% in notes. He stated he received releases from the

shippers in consideration of making such part payments, and that for several years he had purchased potatoes in North Carolina as a representative of M. & L. Fruit and Produce Corporation, of New York City, that in 1941 he was not questioned as to whether he was buying for the corporation or for himself, and that when he purchased the potatoes in question he told the sellers to send them to him. He also admitted that he was the defendant in a case in U.S. District Court for the Southern District of New York in which a permanent injunction was issued against him on October 22, 1941, enjoining him from handling fresh fruits and vegetables in interstate commerce.

The record showed that Joe Garro owned no stock in the corporation, the stockholders being the wives of the officers, each of whom owned $1\frac{1}{2}$ shares. Garro and Nathan Weiner each voted for the other for the offices of President and Secretary-Treasurer, respectively. The wife of the former borrowed money from her husband to put into the business. Garro testified that he and Weiner received salaries from the corporation, that the corporation had not made any profits, and that his wife, prior to the formation of the corporation, had never been engaged in the fruit and vegetable business. Weiner testified that he did not know Garro had been enjoined from handling fruits and vegetables in interstate commerce.

Ruling included in Decision

Joe Garro's failure to account for the fresh fruits and vegetables mentioned above constituted repeated and flagrant violations of the act, in consequence of which the application of the corporation of which he was president was denied. The record showed that the corporation was formed for the purpose of evading the law and not for the purpose of conforming thereto. From the manner of electing the officers of the corporation, and the fact that the wives of the officers were the only stockholders and knew nothing about the fruit and vegetable business, it was clear that the corporation was formed for the obvious purpose of affording Joe Garro an opportunity to re-enter the produce business, and, at the same time, to avoid the injunction outstanding against him.

S-2899, April 14, 1942, Docket 4024: (S.P.)

PUEBLO VEGETABLES, INC., PUEBLO, COLO. v. J. HYMAN BROKERAGE CO., OMAHA, NEBRASKA.

Violation charged: Failure to pay the full contract purchase price for a carload of peaches.

B-11 Principal points involved: To avoid
B-8 personal liability, agent must disclose
M-14 identity of his principal; when shipment released on instructions to "deliver and collect," delivery without collection violates definite instructions and makes agent personally liable.

Order: Complainant awarded \$291.25, plus interest.

Outline of Facts

The complaint and attached exhibits showed that on September 13, 1940, complainant shipped from Paonia, Colorado, to respondent, a carload of U.S. No. 1 Colorado Elberta peaches in boxes, for sale for the account of complainant at 64¢ per box delivered Omaha, Nebraska; that the peaches were inspected at Paonia on September 2, 1940 by a Federal-State inspector and found to be U.S. No. 1; that respondent was instructed to collect the proceeds and deliver the peaches to the buyer; that upon arrival respondent accepted the peaches and sold them for the account of the complainant and remitted a part of the net proceeds; and that a balance of \$291.25 still remained due, for which amount an award was asked.

In his answer, respondent stated that, acting as broker, he sold the peaches to an Omaha buyer; that respondent attempted to collect the proceeds of sale and obtained \$272.02, leaving a balance of \$291.25 due and owing; and that, as an accommodation to complainant, respondent had a suit filed at Omaha in complainant's name, against the railroad and the Omaha buyer, judgment in which was rendered in favor of the defendants, whereupon the case was appealed to the District Court of Douglas County, Nebraska, where it is now pending.

As soon as complainant was informed that suit had been instituted in its name in the court at Omaha it disclaimed any responsibility, and so informed the attorneys.

Ruling included in Decision

1. Respondent's failure to account to complainant for the balance of the purchase price was in violation of the act. The Department has repeatedly held that, in order to avoid personal liability, one acting in a representative capacity, must disclose the identity of his principal. The evidence disclosed that respondent made no accounting whatever to complainant until some forty days after the peaches were accepted, and in a letter dated December 20, 1940, respondent advised complainant that the peaches had been sold to the Omaha buyer and "we did not mention his name, not because we feared what you would say about his rating, but just did not think it was necessary." Moreover, on September 13, complainant wired respondent, in part, "released you deliver and collect (car number)." Complainant was awarded \$291.25, plus interest.

2. When complainant released the peaches to the respondent by its wire of September 13, it was on the basis of "deliver and collect." Respondent, in delivering the peaches to the buyer without collecting the purchase price, violated definite instructions, thereby becoming personally liable for the purchase price.

S-2903, April 18, 1942, Docket 3984: (S.P.)

DIAMOND "K" VINEYARDS, EXETER, CALIF. v. WILLIAM MOSKOVITZ, CHICAGO, ILL.

Violation charged: Failure truly and correctly to account for five carloads of grapes.

B-6

Principal point involved: Broker, under an exclusive sales agency agreement entitled to brokerage on shipments made to another broker contrary to the agreement.

Order: Complainant awarded \$794.31, plus interest.

Outline of Facts

Complainant claimed that, through the respondent, as broker, during the month of August, 1940, it sold to a Chicago firm three carloads of Thompson Seedless grapes, U.S. No. 1, at the agreed price of 50¢ per display lug, making a total of \$549 per carload; that the Chicago firm accepted the grapes and paid the "guaranteed price" to the respondent, who failed to transmit and pay the complainant the "purchase price" thereof, leaving a balance of \$1242 due and owing; that on

October 9, 1940, complainant consigned to respondent for sale for complainant's account two carloads of Alicante grapes, grade U.S. No. 1, at the agreed price of 90¢ "per lidded lug"; that respondent made sale of the two carloads, but failed to pay to complainant the net proceeds of \$987.31; the total sum of \$2229.31, less brokerage of \$35 per car on five cars, \$175, or \$2054.31 being due and owing to complainant, plus "additional expenses" caused by respondent's withholding proceeds such as telephone, telegraph, travel, and professional services, in an amount of approximately \$150.

Respondent contended that on April 27, 1940, he entered into a sales agency agreement with complainant whereby he was made the exclusive agent of complainant for the marketing of its grapes in Chicago and vicinity during the year 1940; that the 5 cars of grapes delivered to the Chicago firm were not in accordance with the contract; that \$1680 was due him for brokerage that would have been earned on 48 cars of grapes under the exclusive agency agreement during 1940 except for the wrongful termination of the agreement by complainant; and that respondent was damaged in the sum of \$875, brokerage that he could have earned on 25 carloads of grapes had complainant not quoted prices that were out of line with quotations of other California shippers:

Rulings included in Decision

1. From a review of some of the communications exchanged between the parties, some of which were quoted in the decision and some of which were not, it was concluded that an oral sales agency contract was discussed by the parties and agreed upon, whereby complainant appointed respondent its exclusive agent to sell the various kinds of grapes raised by complainant in 1940 to purchasers within the city of Chicago and in the surrounding territory, the sales being subject to approval by complainant, respondent's compensation to be \$35 per carload, all payments for grapes made to respondent to be forwarded, less deduction of brokerage.

2. The record showed that an agent of the Chicago purchaser who was present at complainant's shipping point, agreed to the substitution of varieties in the cars respondent claimed did not comply with contract.

3. Complainant's shipment during October, November and December, 1940, of 36 carloads of grapes to a Chicago broker for sale was contrary to the conditions of the exclusive sales agency agreement with respondent, and a breach of that contract, and, by reason thereof, respondent was damaged in the sum of \$35 per car, or \$1260. The other twelve cars shipped to this broker were stored and were sold in 1941.

4. Since there was no proof that the orders for the 25 carloads were made in writing, and that complainant had approved the sales, which requirements were essential to complete enforceable contracts, and because of the lack of other supporting details concerning the orders, it was concluded that the evidence was insufficient to support an award of \$875 to respondent.

5. Respondent failed truly and correctly to account promptly for the proceeds of sale of grapes handled by him for the account of complainant. Complainant was awarded \$2229.31, less unpaid brokerage of \$35 per car on 5 cars, \$175, and \$1260 brokerage that would have been earned on 36 cars, or a total of \$794.31, plus interest. The \$150 asked to cover disbursements designated as "telephone, telegraph, travel expense, and personal services" could not be included because of the character of the expenditures and the lack of specific details concerning the items.

S-2907, April 24, 1942, Docket 4056: (Hearing)

BAUMEL BROS., LOS ANGELES, CALIF. v. REX D. MATHEWS & CO.,
TWIN FALLS, IDAHO.

Violation charged: Failure to deliver
onions in accordance with contract.

Principal point involved: Stipulation as
to settlement of differences entered
into by parties during hearing.

Order: Complaint dismissed.

Outline of Facts

Complaint was filed for reparation against Rex D. Mathews, doing business as Rex D. Mathews & Co., in the amount of \$847.23, the balance alleged to be due complainant on account of failure of respondent to make delivery in accordance with contracts entered into during July and August 1940, contemplating the shipments of onions from Idaho Falls, Idaho, to Stockton, California.

A copy of the formal complaint and of the report of investigation were served on respondent on September 18, 1941, and an answer was filed on December 1, 1941, in which it was denied that complainant was entitled to \$847.23. Respondent alleged that he did not owe complainant any sum in excess of \$202.23.

Ruling included in Decision

Since the parties during the hearing entered into a stipulation, reading, in part: ". . . that all of the controversies, differences, claims and demands existing between the parties hereto having been compromised and settled, that an order may be entered in the above entitled action, dismissing the same with prejudice, each party paying his own costs," the Secretary ordered the complaint dismissed.

S-2912, May 13, 1942, Docket 3823: (Hearing)

S.H. PHILLIPS, HURLOCK, MD. v. THE A.C. BLAIR COMPANY,
CLEVELAND, OHIO.

Violation charged: Failure to pay the full agreed price for a truckload of cantaloups.

N-4 Principal point involved: Respondent having made a prima facie case of reasonable cause for rejection, burden of proof was on complainant to show contract was modified.

Order: Complainant awarded \$180.33 plus interest.

Outline of Facts

On August 17, 1940, over the telephone, respondent purchased from complainant a truckload of cantaloups, consisting of 211 flats at \$1.22 per crate and 179 "2/3 size crates" at \$2 per crate, or for a total of \$615.42, for shipment from Hurlock, Md., to Cleveland, Ohio, to arrive in time for Monday's market, or about 4:00 a.m., on August 19. The truck driver was employed by complainant to make the delivery, and he called complainant at 9:30 p.m. August 18, from a point 50 miles from Pittsburgh, Pa., saying he was having trouble and would arrive at Cleveland about two hours late. Complainant instructed him to notify respondent and to deliver the cantaloups in Pittsburgh if respondent would not accept them upon arrival. The load was delivered to respondent about 9:00 a.m. August 19, and respondent paid \$50 to the trucker to cover transit expenses, sold the cantaloups on consignment and sent to complainant a check for \$180.33 as the net proceeds of sale. Complainant returned the check and filed complaint asking for an award of \$615.42 less \$50, or \$565.42. In an affidavit attached to the original complaint the truck driver stated that at 3:30 a.m., August 19, he called respondent company and was instructed to proceed to Cleveland with the cantaloups.

Respondent claimed that if the trucker had telephoned at 3:30 a.m. August 19, the call could have been accepted only by the watchman, who had no authority to waive the conditions of the contract which stipulated that the cantaloups must arrive in time for Monday's market; that complainant was notified by wire of rejection of the melons and that complainant authorized sale for his account.

Rulings included in Decision

1. Respondent established a prima facie case of reasonable cause for rejection when he showed that the melons did not arrive in time for Monday's market, as required by the original contract. The burden was then on complainant to show that the contract was modified to permit late arrival. The only evidence he submitted bearing directly upon this issue was the affidavit of the trucker. Although an affidavit is admissible in hearing cases under the regulations of this Department, if the parties consent, its weight is affected by the fact that the opposite party is not confronted with the witness and there is no opportunity for cross-examination. The evidence failed to prove that the original contract was modified to permit delivery at a time later than that originally specified and that respondent's rejection was without reasonable cause.

2. The cantaloups were rejected by respondent within 24 hours after arrival at Cleveland, and respondent was authorized to make sale for complainant's account. Although complainant denied a telephone conversation was had on the night of August 19, testimony of an employee of the telephone company proved that there was a call at 9:12 p.m. that night. A witness also testified he was on an extension telephone at the time of the conversation and stated that complainant authorized respondent to sell on consignment. The preponderance of the evidence clearly sustained the respondent's claim. Complainant was therefore awarded \$180.33, plus interest.

S-2914, May 21, 1942, Docket 4084: (S.P.)

AMERICAN FRUIT GROWERS, INCORPORATED, LOS ANGELES, CALIFORNIA
v. THE GILBERT CO., ST. LOUIS, MO.

Violation charged: Unjustified
rejection of a carload of tomatoes.

Principal point involved: Under the rule of
caveat emptor, the respondent, having
purchased the tomatoes after his own
inspection, was bound by his bargain.

Order: Complainant awarded \$344.43,
plus interest; countercomplaint
dismissed.

A-1

Outline of Facts

On June 9 and 10, 1942, complainant loaded, at Dialville, Texas, in a refrigerator car, 730 lugs of tomatoes shown by inspection to grade U.S. No. 2. On June 10 shipment was made to St. Louis, Mo., where the car arrived June 14. After inspection on track at St. Louis on June 17, respondent, through a public broker acting as agent for complainant, purchased the tomatoes at 85¢ per lug delivered St. Louis, and, on the same day, resold and shipped the stock to his customer at Indianapolis, Indiana. Respondent's purchaser rejected the tomatoes, claiming they had decay, whereupon respondent refused to pay complainant and abandoned the tomatoes at Indianapolis. Complainant made resale and credited the net proceeds thereof against the invoice price, leaving a balance of \$344.43, for which amount an award was requested.

Respondent claimed that complainant expressly warranted the tomatoes to grade U.S. No. 2 and asked for an award of \$146.88, to cover the alleged loss of profit, since he was unable to secure another carload of tomatoes at Indianapolis in time for delivery to his customer.

Rulings included in Decision

1. Respondent failed to prove there was a warranty, either express or implied, on the part of complainant that the tomatoes graded U.S. No. 2 at St. Louis, Mo. The negotiations between complainant and respondent pertaining to the sale were carried on by the public broker, whose affidavit clearly showed that, at his request, respondent inspected the tomatoes on June 17 on track at St. Louis, and that, after such inspection and without any understanding whatever as to grade, respondent purchased them.

2. Having purchased the tomatoes after his own personal examination and in reliance on his own inspection, under the rule of caveat emptor, respondent was bound by his bargain, regardless of the fact that his purchaser subsequently rejected the tomatoes at Indianapolis, and his failure to make payment was in violation of the act. Complainant was awarded \$344.43, plus interest.

S-2916, May 21, 1942, Docket 4099: (S.P.)

R. A. KLOTZ & CO., CHICAGO, ILL. v. VICTOR W. ANTHONY,
WEYAUMEGA, WISCONSIN.

Violation charged: Failure to pay
a deficit incurred in selling a
carload of potatoes for respondent's
account.

Principal point involved: Failure to pay
deficit was in violation of the act.

Order: Complainant awarded \$43.50,
plus interest.

Outline of Facts

Complainant claimed that on or about February 14, 1941, respondent consigned to complainant a carload of potatoes shipped from Clearwater Lake, Wisconsin, to Scott Field, Ill.; that complainant made an advance of \$375 to respondent; that the potatoes were rejected at Scott Field, and were then forwarded to Louisville, Ky., where sale, through a broker, for respondent's account resulted in a deficit. Complainant asked for an award of \$43.50.

Respondent filed an answer denying owing complainant anything. A sworn statement was submitted by complainant in support of the allegations in the complaint and the exhibits attached thereto. No sworn statement of facts was submitted by respondent.

Rulings included in Decision

1. The evidence disclosed that complainant, after advancing \$375, handled the car of potatoes on consignment for respondent.

2. Respondent's failure to account to complainant for any part of the net deficit incurred in handling the potatoes was a violation of the act. Sale was made for the net amount of \$395.55, after deducting brokerage at Louisville and the invoice price of three sacks of potatoes badly damaged, and resulted in a deficit of \$43.95, after deducting \$375 advanced to respondent, plus \$29.70 additional freight, \$19.80 demurrage at Scott Field, and a \$15 brokerage charge. Complainant was awarded the amount claimed, \$43.50, plus interest.

S-2920, May 23, 1942, Docket 4055: (S.P.)

D. L. PIAZZA BROKERAGE CO., MINNEAPOLIS, MINN. v. F.J. McCANN & SON, SALINAS, CALIF.

Violation charged: Failure to pay an allowance granted to complainant on a carload of lettuce.

A-4

Principal points involved: Diversion of shipment without shipper's consent is equivalent to acceptance; Minneapolis and St. Paul are in different switching districts, as affected by above rule.

Order: F.J. McCann & Son awarded \$81, plus interest.

Outline of Facts

Complainants, through complaint filed with the Department, sought an award of reparation for damages of \$75.04, the amount claimed to be due on a carload of lettuce purchased from respondents and shipped from Salinas, California to Minneapolis, Minn., on August 28, 1940.

Respondents admitted \$75 was due complainants on the car of lettuce just mentioned, but claimed, in a counter-complaint, that on November 22, 1940 the parties entered into negotiations for the purchase and sale of a carload of lettuce for the agreed price of \$1.25, plus 15¢ credit on the allowance on the previous car, or \$1.40 per crate for the 312 crates, or \$436.80, plus top ice charge; that respondents instructed the carrier to stop the car at Minneapolis for inspection by complainants, indicating expressly "Car not to depart from Minneapolis without shipper's instructions"; that, upon arrival of the car at Minneapolis, complainants diverted it to St. Paul on November 25, and on the same date abandoned the lettuce and so informed the Rock Island Railroad; and that respondents then shipped the car to Montreal, Canada, where it was sold for \$280.80, plus top ice, resulting in damages of \$436.80 less \$280.80, or \$156.

Complainants claimed that Minneapolis and St. Paul are considered a single terminal and that many of their customers are located in the latter city.

Ruling included in Decision

Diversion of the car to St. Paul at complainants' direction was equivalent to an acceptance by complainants, and the right to reject, if any existed, was thereby lost.

It has been held in many proceedings under the act that diversion of a shipment without the shipper's consent is equivalent to acceptance and will disable the buyer from thereafter rejecting the shipment. This rule finds appropriate application where, as here, complainants, by diverting the car of lettuce from Minneapolis to St. Paul, exercised over the shipment a dominion incompatible with the right of rejection. Although complainant claimed that Minneapolis and St. Paul are considered a single terminal, the significant fact was that the two cities are in different switching districts and that diversion from one to the other of the two cities was therefore a diversion within the intentment of the stated rule. F.J. McCann & Sons were awarded \$156 less \$75, or \$81, plus interest.

S-2246, July 15, 1939, Docket 3357: (Hearing)

Re: Application of Joe Bordenaro, Des Moines, Iowa, for a license under the Perishable Agricultural Commodities Act.

Order: Application of Joe Bordenaro
for a license denied.

Outline of Facts

On May 19, 1939, the Secretary of Agriculture issued a notice of hearing and order to show cause why Joe Bordenaro's application dated March 8, 1939, for a license under the act should not be denied. It was alleged that the applicant was president of the Blue Ribbon Fruit Co., of Des Moines, Iowa, a licensee under the act, that the company purchased perishable agricultural commodities in interstate commerce for which, in violation of the act, it failed truly and correctly to account promptly to the persons with whom the transactions were had, which failures to account constituted flagrant and repeated violations of the act; and that Joe Bordenaro was actively engaged in the management and direction of the affairs of the corporation and was responsible, in whole or in part, for the violations. It was further alleged that the respondent since February 27, 1939, engaged in the business of handling perishable agricultural commodities in interstate commerce as a commission merchant, broker or dealer, without having a valid and effective license under the act.

At the hearing the applicant admitted the truth of the allegations made in the complaint, with the exception of the one which stated that the affairs of the company were conducted in such a manner as to divert or deplete its assets with the purpose or effect of preventing said corporation from meeting its obligations and satisfying its creditors. He also admitted that he had, within two years prior to the date of the hearing, May 25, 1939, engaged in practices of a character prohibited by the act, and that he was unfit to engage in business and be licensed as a commission merchant, broker, or dealer within the meaning of the provisions of the act. The applicant then waived further hearing and consented to the issuance of findings of

fact in conformity with his admissions, and to an order denying his application for a license, and to publication of the facts involved. He tendered to a representative of the Department the sum of \$27.50, in settlement of his liability for operating without a license during the period between February 27, 1939 and May 25, 1939, of which sum \$2.50 represented license arrearage fees and \$25 represented penalty.

Ruling included in Decision

Based upon the foregoing findings of fact, it was determined and concluded that the application of Joe Bordenaro for a license to engage in the business of handling fresh fruits and fresh vegetables, in interstate or foreign commerce, as a commission merchant, dealer, or broker, should be denied. The facts were ordered published. (Publication somehow was overlooked until in 1942 when it was considered too late.)

